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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

BDO SEIDMAN, BRACEWELL AND PATTERSON, J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, and WILLIAM M. TEMPLETON,

Petitioners,

v.

GAYLON D. SIMMONS, GLORIA ANNETTE TURNER SIMMONS, GREENWICH INSURANCE COMPANY, and THE UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1 (1993), violate Articles I and III of the Constitution of the United States and the Separation of Powers doctrine by directing the Judiciary to overturn certain of its judgments that have become final and are not subject to appeal?

2. Does the reinstatement requirement in Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1 (1993), unconstitutionally take vested property rights from private litigants in violation of the Due Process and Takings Clauses of the Fifth Amendment to the Constitution of the United States by undermining judgments that became final and unappealable prior to the enactment of Section 27A?

3. Does the definition of a limitation period for certain private civil actions in Section 27A of the Securities Exchange Act, 15 U.S.C. § 78aa-1 (1993), unconstitutionally interfere with vested property rights in violation of the Due Process and Takings Clauses of the Fifth Amendment to the Constitution of the United States by affecting the expired repose period for such actions?

PARTIES TO THE PROCEEDING

The following are parties to the proceeding in the United States Court of Appeals for the Fifth Circuit[1]:

1. Gaylon D. Simmons
2. Gloria Annette Turner Simmons
3. BDO Seidman
4. Bracewell and Patterson
5. Greenwich Insurance Company
6. William M. Templeton
7. J.C. Templeton
8. Joe H. Foy
9. Harry V. Carlson
10. Robert Ted Enloe, III
11. W.A. Griffin
12. Thomas L. Kister
13. Leonard Leon
14. Edward T. Cotham
15. United States of America

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[1] TGX Corporation appeared in the style of the court below but was not a party to the proceeding in the United States Court of Appeals for the Fifth Circuit. None of the Petitioners is a corporation, with either a parent company or subsidiaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 1993 WL 268650 (5th Cir. July 20, 1993)[2] and is reprinted in the Appendix ("A") to this Petition at A1. The United States District Court's initial decision is reported at 786 F. Supp. 587 (E.D. La. 1992) and is reprinted at A39. The District Court's subsequent decision on the motion for new trial was not published, but is reprinted at A55.

JURISDICTION

On July 20, 1993, the Court of Appeals reversed the decision of the District Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1 of the Constitution of the United States provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, section 1 of the Constitution of the United States provides, in pertinent part:

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[2] The case was decided with a similar case in a single opinion, which is styled *Pacific Mutual Life Ins. Co. v. First RepublicBank Corp.*

> The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-402, 105 Stat. 2236, 2387 (1991), codified at Section 27A of the 1934 Securities Exchange Act, 15 U.S.C. § 78aa-1 ("Section 27A") provides:

> a. *Effect on pending causes of action.* The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such existed on June 19, 1991.
>
> b. *Effect on dismissed causes of action.* Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 –
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided

> by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

STATEMENT OF THE CASE

This petition is presented to request that the Court resolve the direct conflict between the United States Court of Appeals for the Fifth Circuit in the case below and the United States Court of Appeals for the Sixth Circuit in *Plaut v. Spendthrift Farm, Inc.*, No. 92-5591, 1993 U.S. App. LEXIS 19738 (6th Cir. August 3, 1993). A copy of the Sixth Circuit opinion in *Plaut* is reprinted at A59.

The conflict rests primarily on the narrow question of whether Congress violated the Separation of Powers doctrine by exceeding its Article I authority or by encroaching upon the Article III authority of the Judiciary in the enactment of Section 27A(b), which mandates the Judiciary to overturn certain final judgments. The circuit courts are further split on the question of whether Congress unconstitutionally violated the Fifth Amendment by interfering with private property rights which have been vested by final judgments.

1. The Decisions in *Lampf* and *Beam*.

On June 20, 1991, this Court held that the private cause of action implied by Section 10(b) of the Securities

Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), is subject to the one-year statute of limitations and the three-year period of repose contained in 15 U.S.C. § 78i(e). *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). Contemporaneously with the decision in *Lampf*, the Court decided *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). *Beam* holds that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating that federal law." *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2517 (1993). In light of *Beam*, this Court's interpretation of Section 10(b) in *Lampf* was required to be applied to all pending cases, including this case.

2. Section 27A – Congress' Response.

Following this Court's decisions in *Lampf* and *Beam*, some members of Congress sought to change the statute of limitations in the 1934 Act. Two new statutes of limitations were proposed, but neither was enacted.[3] Gridlocked on the time frame for a new statute of limitations and unable to agree even that the period should be changed, Congress compromised to allow the rule announced in *Lampf* to stand, but to prevent its application to cases pending at the time that *Lampf* was decided.

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[3] *See* 137 Cong. Rec. S10,675-76, S10,691-92 (daily ed. July 23, 1991) (statement of Sen. Bryan) (proposed 2- and 5-year statute of limitations); 137 Cong. Rec. H6316 (daily ed. Aug. 1, 1991) (statement of Rep. Markey) (proposed 3- and 5-year statute of limitations). In fact, neither proposal ever reached the House or the Senate floor.

This effort to undermine the effect of the *Lampf* decision was inserted as Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-402, 105 Stat. 2236, 2387 (1991), and is codified as Section 27A.

3. Procedural History

In 1987, TGX Corporation ("TGX") sued Gaylon Simmons over the terms of a $21 million stock purchase contract which the parties executed in November 1986, and Gaylon and Gloria Simmons (collectively "Simmons") filed a counterclaim against TGX under Section 10(b).[4] TGX filed for bankruptcy protection in 1990, staying the counterclaim. The Simmons then filed a separate Section 10(b) suit in March 1990 against Petitioners, who had served either as directors or as law or accounting firms to TGX Corporation.

Following the Supreme Court decision in *Lampf*, the Petitioners filed dispositive motions. The Simmons' claims were dismissed and no appeal was filed. The judgment became final.

After passage of Section 27A, and after the time for appeal had run, the Simmons filed a motion to reinstate the 1990 suit on January 6, 1992. The Petitioners objected, alleging among other grounds that Section 27A was unconstitutional. The District Court agreed and refused to reinstate the case. A53-54. In response to the Simmons'

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[4] Jurisdiction for those claims was invoked pursuant to 15 U.S.C. § 77v, based on an alleged violation of the 1934 Act, and pursuant to 28 U.S.C. § 1331, based upon a question of federal law.

motion for new trial and the intervention of the United States, the District Court again refused to reinstate, adding new findings of unconstitutionality. A57-58.

On appeal, the Fifth Circuit reversed the holding of unconstitutionality and remanded the case to the District Court. A38.

REASONS FOR GRANTING WRIT

The constitutional doctrine of Separation of Powers defines the functions of the respective branches of this government. The core function of the legislative branch is to state what the law shall be, while the core judicial function is to interpret what the law is. "[T]hat which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." T. Cooley, CONSTITUTIONAL LIMITATIONS 91 (1868), *quoted in Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring).

Regardless of the theory used to analyze Section 27A, it cannot be disputed that Congress, unable to agree on a change to the limitations portion of the 1934 Act, as interpreted by this Court in *Lampf*, resorted to a purely retroactive, judicial-like excursion into the arena of directing court decisions. Like a chameleon, Section 27A pretends to defer to the prior judicial decisions of each jurisdiction, while directing the courts in this certain class

of cases to follow the very law which this Court has previously determined to be erroneous.

Similarly, while Section 27A ostensibly restores the expectations of some plaintiffs that prior legal interpretations by intermediate appellate courts would remain unchanged during the pendency of their suits, it destroys the expectation of all litigants that cases finally concluded and adjudicated will remain forever closed. Chief among the personal interests safeguarded by the Bill of Rights is the retention of property rights once they are legally acquired. One means of acquisition and retention, which has always been a certainty, is final adjudication. As interpreted by the Court of Appeals below, Section 27A(b) renders final adjudication worthless.

The intent of Congress in enacting Section 27A is unquestioned. Congress sought to shield that set of cases pending on June 19, 1991, from this Court's decision in *Lampf*. The vehicle Congress chose, Section 27A, violates the doctrine of Separation of Powers and tramples upon vested private property rights, which necessarily renders it unconstitutional.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THE SIXTH CIRCUIT ON THE CONSTITUTIONALITY OF SECTION 27A(b).

Only two Courts of Appeal have considered whether Section 27A(b) is unconstitutional as applied to final non-appealable judgments: the Fifth Circuit in *TGX* and the

Sixth Circuit in *Plaut*.[5] Their holdings and conclusions are directly and irreconcilably in conflict. Only this Court can resolve this conflict.

The number of cases dealing with various constitutional aspects[6] of Section 27A only underscores the importance of resolving this conflict.[7]

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[5] The Ninth Circuit expressed no opinion as to the constitutionality of Section 27A as it applies to cases that were final at the time the legislation was enacted, but the court implied that Congress does not have the authority to alter the statute of limitations for cases that are final as opposed to pending. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993).

[6] Other arguments raised in objection to the constitutionality of Section 27A include: (1) Congress has directed the lower courts to ignore the Supreme Court decisions in *Lampf* and *Beam*; (2) Congress has mandated a selective prospective application of *Beam* and arguably *Lampf*; (3) Congress has attempted to act as a "super appellate court," seeking to overturn the Supreme Court decision in *Lampf*; and (4) Congress has prescribed a rule of decision seeking to affect the outcome of an identifiable set of cases, in violation of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

[7] A number of other courts of appeal and district courts have analyzed other constitutional objections to Section 27A. *See, e.g., Cooke v. Manufactured Homes, Inc.*, No. 93-1005, 1993 U.S. App. LEXIS 17167 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir.), *reh'g granted in part*, 977 F.2d 1549 (1992), *cert. denied*, 113 S. Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, June 25, 1993; *In re Brichard Securities Litigation*, 788 F. Supp. 1098 (N.D. Cal. 1992); *Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F. Supp. 1092 (D. Colo. 1992); *Abrams & Wofsy v. Renaissance Investment Corp.*, 820

II. THE FIFTH CIRCUIT'S DECISION, CONTRAVENING THE FUNDAMENTAL SEPARATION OF LEGISLATIVE AND JUDICIAL POWERS BY UPHOLDING THE CONSTITUTIONALITY OF SECTION 27A(b), DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH LONG-STANDING DECISIONS OF THIS COURT.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law in a way that conflicts with prior decisions of this Court. In deciding *Plaut*, which concluded that Section 27A(b) cannot be constitutionally applied to final judgments, the Sixth Circuit, following the doctrine of *stare decisis*, found it unnecessary to go beyond the still valid and binding precedent of this Court in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). As the Sixth Circuit stated:

> Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with *Hayburn's Case*.

A71-72.

F. Supp. 1519 (N.D. Ga. 1991); *Rosenthal v. Dean Witter Reynolds, Inc.*, 811 F. Supp. 562 (D. Colo.), *rev'd*, 982 F.2d 529 (10th Cir. 1992); *In re Prudential-Bache Energy Income Partnerships Securities Litigation*, 815 F. Supp. 177 (E.D. La. 1993); *Treiber v. Katz*, 796 F. Supp. 1054 (E.D. Mich. 1992); *Dulude v. Cigna Securities, Inc.*, No. 90-CV-72191-DT, 1992 WL 281411 (E.D. Mich. May 15, 1992); *In re Rospatch Securities Litigation*, 802 F. Supp. 110 (W.D. Mich. 1992); *Johnston v. Cigna Corp.*, 789 F. Supp. 1098 (D. Colo. 1992); *Mancino v. International Technology Corp.*, No. 89-7244-RMC (SX), 1992 U.S. Dist. LEXIS 5039 (C.D. Cal. March 10, 1992).

Recognizing the powerful motivation of the Congress in the passage of Section 27A, the Sixth Circuit nevertheless called upon deeper principles underlying the respective functions of the Congress and the Judiciary and firmly rejected the idea that the encroachment of Section 27A upon the powers of the Judiciary to render final judgments is harmless:

> For if Congress may by legislation reverse or vacate the final judgments of the Federal courts, then Congress has rendered the whole function of the judiciary futile . . . .
>
> * * *
>
> But Congress may not require the Federal courts to nullify or vacate their properly rendered judgments, regardless of what injustice Congress believes those judgments have visited upon private parties.

A85-86.

In fact, the importance of final judgments to the principle of Separation of Powers has been recognized by this Court on a number of occasions since *Hayburn's Case.* In *McCullough v. Virginia,* 172 U.S. 102 (1898), the Court struck down a Virginia statute which effectively invalidated bonds which had been adjudged by a Federal court to be valid and negotiable. Although the Court in *McCullough* rested its holding at least partially upon the idea that a judgment gives "vested rights" to litigants, the Court used Separation of Powers as an element of that holding. 172 U.S. at 123-24.

This Court has previously held that when the legal rights of parties have been finally determined, principles

" 'of public policy and of private peace' " dictate that the matters not be open to relitigation every time there is a change in the law. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)).

III. THERE IS DISAGREEMENT AMONG THE CIRCUIT COURTS AS TO THE EFFECT OF RETROACTIVE LEGISLATION, INCLUDING SECTION 27A(b), ON FINAL NON-APPEALABLE JUDGMENTS.

When the Simmons sought reinstatement pursuant to Section 27A(b), Petitioners also urged that final non-appealable judgments vest substantive rights which are protected by the Due Process and Takings Clauses of the Fifth Amendment.

In *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), the Court held that:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb rights created thereby ceases.

Legislation may affect prior adjudication only when no private rights are taken as a result.[8]

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[8] Congress may waive the rights of the United States in suits to which it is a party, and Congress may waive rights which belong to the public at large. *Pennsylvania v. Wheeling &*

The District Court found that a "failure to distinguish between cases with and without final judgments causes Section 27A(b) to run afoul of established due process principles. . . . final judgments give rise to vested rights and . . . Congress cannot divest successful litigants of said rights." A56-57. The Court of Appeals rejected the vested rights analysis and reversed, ruling that because "Congress can, under some circumstances, create private civil liability for past acts . . . there is no due process reason why Congress cannot reach the same result by upsetting a judgment." A22.

In *Plaut*, the Sixth Circuit found that Section 27A(b) "deprives the defendants of their vested rights in the court's final judgment." A61. The majority held the statute unconstitutional. A61. One member of that court concurred in the result, but wrote separately because he believed a saving interpretation of the statute[9] which

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Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855). When it does so, however, Congress cannot affect private rights. *Hodges v. Snyder*, 261 U.S. 600, 603-04 (1923).

[9] This Court has held that, "[r]etrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913), *quoted in United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). Even where the legislature manifests an intent that a statute have some retrospective application, the *scope* of an act's retroactive effect must be read narrowly; this is especially true where an expansive reading will call the statute into constitutional doubt. *Cromwell v. Benson*, 285 U.S. 22, 62 (1932); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). This Court has declared that if it is "fairly possible to interpret [a] statute in a manner that renders it constitutionally valid" such a reading

excluded final judgments from its reach was available. A89.

Although the Fifth and Sixth Circuits are (as of this writing) the only appellate courts to consider this issue as to Section 27A,[10] the question of whether a congressional act which has a retroactive effect but which makes no mention of final non-appealable judgments must be read to exclude such judgments has been squarely addressed by the Eleventh Circuit and the Circuit for the District of Columbia. *Georgia Association of Retarded Citizens v. McDaniel,* 855 F.2d 805 (11th Cir. 1988), *cert. denied,* 490 U.S. 1090 (1989); *Daylo v. Administrator of Veterans' Affairs,* 501 F.2d 811 (D.C. Cir. 1974). Both circuit courts resorted to a saving interpretation.

Only this Court can resolve the uncertainty as to whether retroactive legislation generally and Section 27A specifically is to be interpreted as applicable to final judgments, and, if so, whether such legislation is void as violative of the Fifth Amendment.

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must be chosen. *Communication Workers of America v. Beck,* 487 U.S. 735, 762 (1988).

[10] Several other district courts have held Section 27A unconstitutional under the *McCullough* doctrine. *See, e.g., Plaut v. Spendthrift Farm, Inc.,* 789 F. Supp. 231, 234 (D. Ky. 1992), *aff'd,* No. 92-5591, 1993 U.S. App. LEXIS 19738 (6th Cir. August 3, 1993); *In re Brichard Securities Litigation,* 788 F. Supp. 1098, 1102 (N.D. Cal. 1992); *Johnston v. Cigna Corp.,* 789 F. Supp. 1098, 1100 (D. Colo. 1992); *Treiber v. Katz,* 796 F. Supp. 1054 (E.D. Mich. 1992).

IV. THE FIFTH CIRCUIT'S HOLDING THAT THE THREE-YEAR PERIOD OF REPOSE FOR SECTION 10(b) CLAIMS IS PROCEDURAL RATHER THAN SUBSTANTIVE CONFLICTS WITH THIS COURT'S RULING IN *LAMPF.*

The last issue addressed by this Court in *Lampf* was the nature of the three-year time limit for bringing private actions under Section 10(b). This Court held that "the 3-year limit is a period of repose inconsistent with tolling." *Lampf,* 111 S. Ct. at 2782.

This Court has long held that the running of a period of repose vests in a potential defendant the right to be free of liability. In *William Danzer & Co. v. Gulf & Ship Island Railroad Co.,* 268 U.S. 633 (1925), this Court ruled that unlike lapsed periods of limitation which stand as procedural bars to the enforcement of rights, lapsed periods of repose erase liability and cannot be altered by retroactive legislation. The Fifth Circuit declined to apply the *Danzer* holding to this case. A writ of certiorari should issue to determine whether rights of repose which are not subject to equitable tolling can nonetheless retroactively be taken by legislative act.

CONCLUSION

Petitioners respectfully pray that this Court issue a writ of certiorari to the Fifth Circuit to resolve the clear conflict between the Fifth and Sixth Circuits and to decide fundamental and important questions of federal law which conflict with prior decisions of this Court and

which will continue to encumber the federal courts until the constitutionality of Section 27A(b) is resolved.

Respectfully submitted,

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August 25, 1993

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Plaintiff-Appellant,

v.

FIRST REPUBLICBANK CORP.,
et al., Defendants-Appellees.

TGX CORP., Plaintiff,

v.

Gloria Annette Turner SIMMONS, et al.,
Defendants-Appellants
Cross-Appellees,

v.

GREENWICH INSURANCE COMPANY, et al.,
Defendants-Appellees Cross-Appellants.

Gaylon D. SIMMONS, et al.,
Plaintiffs-Appellants Cross-Appellees,

v.

J.C. TEMPLETON, et al.,
Defendants-Appellees Cross-Appellants.

Nos. 92-1662, 92-3375.

United States Court of Appeals,

Fifth Circuit.

July 20, 1993.

Appeal from the United States District Court for the Northern District of Texas.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

Plaintiffs who suffered dismissals in two separate securities-fraud cases asked the district courts to reinstate their claims under § 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which Congress enacted in November 1991. The district courts denied these motions after holding that § 27A(b) violates the Constitution by disturbing final judgments and invading judicial authority. We conclude that the legislation is constitutional and we reinstate the plaintiffs' suits.

I. BACKGROUND

A. Pacific Mutual Life Ins. Co. v. First RepublicBank Corp. et al

In March 1991, Pacific Mutual Life Insurance Company (PMLI) sued investment bankers and accountants (collectively PMLI Defendants)[1] for securities fraud under § 10(b) of the 1934 Securities Exchange Act (1934 Act), 15 U.S.C. § 78j(b). PMLI's claims arise from the June 1987 merger of InterFirst Corporation and RepublicBank Corporation, PMLI's purchase of InterFirst securities in July and September 1987 for approximately $8 million, and the PMLI Defendants' facilitation of those transactions.

From long before PMLI purchased the securities to the time after PMLI filed its suit, this court determined

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[1] The PMLI Defendants are Morgan Stanley & Co., Goldman Sachs & Co., Ernst & Young & Co., and Salomon Brothers Inc.

the statute of limitations for implied private actions under § 10(b) according to analogous state law. When PMLI filed its suit in the United States District Court for the Northern District of Texas, our precedent recognized that the four-year limitations period applicable to fraud actions in Texas also governs § 10(b) actions filed there. *In re Sioux, Ltd., Sec. Litig. v. Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). For that reason, although the PMLI Defendants filed dispositive motions under FED.R.CIV.P. 9(b) and 12(b)(6), they did not contest the timeliness of PMLI's suit.

While these motions awaited the district court's consideration, the Supreme Court issued *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). *Lampf* implicitly overrules *Sioux, Ltd.* and many similar cases in other circuits with its holding that the Securities Exchange Act as written in 1934, not state law, establishes the limitations period for § 10(b) suits. *Id.* at ___, 111 S.Ct. at 2780. The Court read the Securities Exchange Act of 1934 to establish a uniform rule that "[l]itigation instituted pursuant to § 10(b) . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at ___, 111 S.Ct. at 2782 (1-and-3 rule).

On the same day that the Court rendered *Lampf*, it decided *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). A plurality of the *Beam* Court held that Georgia's Supreme Court erred by "refus[ing] to apply a rule of federal law retroactively after the case announcing the rule has already done so." *Id.* at ___, 111 S.Ct. at 2446. *Beam* teaches that "when th[is]

Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at ___, 111 S.Ct. at 2448.

Because the *Lampf* Court applied the 1-and-3 rule to eliminate Gilbertson's § 10(b) claim, *Beam* required courts to apply the limitation rule announced in *Lampf* to pending claims under § 10(b). The PMLI Defendants promptly brought *Lampf* and *Beam* to the district court's attention, and the court dismissed PMLI's § 10(b) claims with prejudice in August 1991. The district court based its dismissal on the fact that "the face of [PMLI's complaint establishes] that this action was filed more than three years after the alleged misrepresentations or omissions upon which [PMLI's] claim rests." Recognizing no way around *Lampf* and *Beam*, PMLI did not appeal.

Three months later, however, Congress provided a way around *Lampf* and *Beam* by passing § 27A, which provides:

> *(a) Effect on Pending Causes of Action.* – The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> *(b) Effect on Dismissed Causes of Action.* – Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 –

> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after [December 19, 1991].

1934 Act, § 27A (amended by P.L. 102-242 (December 19, 1991)), *codified at* 15 U.S.C. § 78aa-1. On January 31, 1992, PMLI filed a motion to reinstate pursuant to § 27A(b). The PMLI Defendants challenged the constitutionality of § 27A(b), and the district court admitted the United States as an intervenor to explain why § 27A is constitutional. After considering the parties' written submissions, the district court held: 1) § 27A(b) contravenes due process by divesting the PMLI Defendants of their final judgment; and 2) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. PMLI appeals from the district court's denial of its motion to reinstate. 806 F.Supp. 108.

B. SIMMONS, ET AL. V. TGX CORP., ET AL.

In 1987, TGX Corporation sued Gaylon Simmons[2] over a $21 million stock purchase contract which the parties executed in November 1986, and Simmons filed a counterclaim against TGX under § 10(b). TGX filed for

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[2] Gloria Simmons joins Gaylon Simmons as a party to this dispute.

bankruptcy protection in 1990, staying the counterclaim. Simmons then filed a separate § 10(b) suit in March 1990 against attorneys, accountants, and directors (collectively TGX Defendants)[3] who facilitated the stock purchase.

Simmons sued the TGX Defendants in the United States District Court for the Eastern District of Louisiana.[4] The parties disputed whether Simmons met Louisiana's two-year prescriptive period for securities fraud, which this court has held applicable to § 10(b) claims. *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988). The Supreme Court rendered *Lampf* and *Beam* before the district court ruled on the parties' limitation dispute.

The TGX Defendants informed the district court that Simmons sued them in March 1990, and his complaint alleges November 1986 misdeeds. They argued that these facts entitled them to dismissal under *Lampf's* 1-and-3 rule. Simmons did not dispute the effect of *Lampf*, and the district court directed the TGX Defendants to draft a judgment and order. That document recited:

> all of the federal claims asserted are time-barred, and the Defendants are entitled to judgment on those claims as a matter of law; and [the court finds that] final judgment should be entered. . . .

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[3] The TGX Defendants are J.C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W.A. Griffin, Thomas L. Kister, Leonard Leon, Edward T. Cotham, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Co., and William M. Templeton. Simmons amended his complaint to add Greenwich and W.M. Templeton as defendants in May 1991.

[4] The court consolidated this suit with the suit between TGX Corporation and Simmons.

> [P]laintiffs' claims . . . under . . . the Securities Exchange Act of 1934 are hereby dismissed with prejudice.

Simmons asked the district court to delete "with prejudice" from the judgment to avoid any preclusive effect, and the court obliged before signing it in August 1991. Simmons did not appeal this judgment.

Simmons sought the deletion from the August 1991 judgment because he thought that he could avoid *Lampf* by adding the TGX Defendants as parties to the 1987 counterclaim against TGX, and he did not want the dismissal in the March 1990 suit to preclude him from doing so. Simmons's idea ultimately proved unsuccessful,[5] and the district court entered another judgment dismissing Simmons's § 10(b) claims against the TGX Defendants in October 1991. Simmons did not appeal this October 1991 judgment.

With renewed hope from § 27A(b), Simmons filed a Motion to Reinstate the March 1990 suit in January 1992. The parties disputed both the applicability and constitutionality of § 27A(b). In March 1992, the district court held: 1) the court dismissed Simmons's March 1990 § 10(b) suit "as time barred" within the meaning of

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[5] A magistrate permitted Simmons to amend his 1987 counterclaim for purposes of procedure only, but the district court held that the additional claims did not relate back to the 1987 claims, so those claims were still untimely. In its September 1991 minute entry explaining why Simmons's § 10(b) claims were still untimely, the district court stated that the August 1991 judgment did not preclude the amendment to the 1987 counterclaim because the court entered the August 1991 judgment without prejudice.

§ 27A(b) despite the fact that the court dismissed the suit without prejudice in August 1991; and 2) Simmons timely filed his § 10(b) claims under Louisiana's two-year prescription period and *Jensen;* but 3) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam. TGX Corp. v. Simmons,* 786 F.Supp. 587 (E.D.La. 1992).

In April 1992, Simmons asked for a new trial on his reinstatement motion. In May 1992, the district court denied Simmons's motion for a new trial after holding that, in addition to *Beam's* implications, § 27A(b) violates due process principles by upsetting final judgments. Simmons appeals from the district court's denials of his motion to reinstate and his new-trial motion. The TGX Defendants cross-appeal the district court's ruling that Simmons's March 1990 suit falls within the scope of § 27A(b) even though the district court dismissed that suit without prejudice in August 1991. The United States intervenes to defend the constitutionality of § 27A(b).

II. ANALYSIS

Simmons and *PMLI* ultimately raise the same novel constitutional questions, so we decide both appeals in this opinion. We review the district courts' decisions concerning the meaning and constitutionality of § 27A(b) *de novo. Moulton v. City of Beaumont,* 991 F.2d 227, 230 (5th Cir. 1993); *Gray v. First Winthrop Corp.,* 989 F.2d 1564, 1567 (9th Cir. 1993). We proceed without the benefit of prior appellate attention to § 27A(b).

A. WHETHER A CONSTITUTIONAL SECTION 27A(B) HELPS SIMMONS

The TGX Defendants argue that § 27A(b) does not afford Simmons any relief even if it is constitutional, because Simmons asked the district court to dismiss his March 1990 claims under § 10(b) without prejudice. But all of their arguments require an inaccurate reading of § 27A(b).

Congress wrote § 27A(b) to prevent courts from applying *Lampf* to cases that plaintiffs filed before the Court rendered *Lampf*. Section 27A(b) states a specific procedure (motion for reinstatement within 60 days of enactment) to restart "[a]ny" § 10(b) claim "commenced on or before June 19, 1991 . . . which was dismissed as time barred" after *Lampf*, but "would have been timely filed" before *Lampf*.

What little legislative history exists for § 27A confirms that Congress intended to obliterate *Lampf* and *Beam* for all cases filed before the Court rendered *Lampf*.[6] *See, e.g.*, 137 Cong.Rec. S17382 (daily ed. Nov. 21, 1992) (Sen. Riegle, § 27A sponsor) ("The language of the bill is designed to return plaintiffs and defendants to exactly the position that they had on June 19, 1991," the day before the Court rendered *Lampf*.); *id.* at H11813 (daily ed. Nov. 26, 1991) (Rep. Markey) ("The language . . . unambiguously reverses the *Lampf* ruling's application of

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[6] For a comprehensive treatment of the legislative history of § 27A, see Anthony Michael Sabino, A Statutory Beacon or a Relighted Lampf? *The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 TULSA L.J. 23, 27-30 (1992).

the 1-year and 3-year statute of limitations. . . . "). The Supreme Court itself has recognized as much. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau*, ___ U.S. ___, ___, 113 S.Ct. 2085, 2089, ___ L.Ed.2d ___ ("Congess . . . limit[ed] the retroactive effect of [*Lampf* by directing] the applicable 'limitation period for any private civil action implied under [§ 10(b)] that was commenced on or before June 19, 1991. . . . ' "); *id.* at ___, 113 S.Ct. at 2095 (Thomas, J., dissenting) (Congress "alter[ed] the retroactive effect of the 10b-5 limitations period that we adopted in *Lampf.*"). We know of no evidence or reason that supports a narrower reading of § 27A. *Compare Herman & MacLean v. Huddleston*, 459 U.S. 375, 386, 103 S.Ct. 683, 689, 74 L.Ed.2d 548 (1983) (interpreting securities laws to "further[] their broad remedial purposes").

1. Time-Bar Dismissal

The TGX Defendants seize on the district court's statement that Simmons did not voluntarily dismiss his § 10(b) claims under Fed.R.Civ.P. 41 by asking the court to dismiss those claims without prejudice in August 1991. *Simmons*, 786 F.Supp. at 590. They argue that the court's statement is erroneous, and once we recognize that Simmons voluntarily dismissed his claims, we must hold that the claims were not "dismissed as time barred" under § 27A(b)(1).

But even if Simmons chose to dismiss his § 10(b) claims, the record conclusively establishes that he did so because *Lampf* rendered those claims time barred. The district court's August 1991 judgment states this very fact. We interpret "dismissed as time barred" in § 27A(b)

to include all cases that were dismissed because of *Lampf's* time bar. Simmons satisfies this but-for scrutiny.

2. *Nullification*

The TGX Defendants have found language in our cases in which this court states that the effect of a voluntary dismissal is to "put the plaintiff in the same legal position in which he would have been had he never brought the first suit." *Taylor v. Bunge Corp.*, 775 F.2d 617, 619 (5th Cir.1985). They would have us apply this language, irrespective of the reasons for and context in which we used it, to hold that Simmons's suit vanished upon voluntary dismissal, leaving nothing to reinstate by operation of § 27A(b).

But there is no rule that makes all voluntarily dismissed cases absolutely null for all purposes. This court has permitted a district court to resurrect a voluntarily dismissed case under FED.R.CIV.P. 60. *Boehm v. Office of Alien Property*, 344 F.2d 194 (5th Cir.1965). And even if there were an absolute-nullity rule, we could not apply it in the face of contrary congressional intent unless we could articulate a constitutional basis for doing so. As we have explained, Congress intended broad relief from *Lampf* for any § 10(b) claim "that was commenced on or before June 19, 1991." Simmons commenced his § 10(b) claims against the TGX Defendants on March 8, 1990, which places those claims within the ambit of § 27A(b).

3. Avoidance

The TGX Defendants cite cases holding that courts should refrain from deciding constitutional questions if possible. *See, e.g., Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 819 (D.C.Cir.1974) ("[W]hen one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of a contrary legislative intent."). They accompany these cites with creative readings of § 27A(b) that would avoid constitutional questions, while conveniently killing Simmons's claims.[7] None of their readings respects Congress' unmistakable intent to keep *Lampf* from operating retroactively in cases that were dismissed as time barred.[8] We will not ignore the obvious meaning of § 27A simply to avoid the constitutional questions that Congress has created.

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[7] For example, the TGX Defendants suggest that Congress really accomplished nothing whatsoever in § 27A because the "laws applicable . . . as such laws existed on June 19, 1991," which § 27A directs courts to apply, are defined by the Securities Exchange Act of 1934, just as *Lampf* holds. They also suggest that § 27A only replaces the one-year limitations period discussed in *Lampf*, and does not affect *Lampf's* direction that § 10(b) actions be further limited by a three-year statute of repose.

The PMLI Defendants suggest that Congress only meant § 27A(b) to reinstate actions that were dismissed from a district court, but still pending on appeal at the time a party files a motion for reinstatement.

[8] *Cf. Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 809 (11th Cir.1988) (Though Congress intended a statute to control cases "pending" before enactment of the statute, the court found no clear intent that the statute would apply to pending cases that a court had also finally dismissed.).

4. Claim Preclusion

Finally, the TGX Defendants point to the district court's October 1991 dismissal of Simmons's amended counterclaim in the TGX suit. They argue that the court dismissed this amended counterclaim with prejudice, and the amended counterclaim raised the same claims that Simmons pursues through his January 1992 reinstatement motion under § 27A(b), so claim preclusion bars any reinstatement of Simmons's March 1990 claims regardless of § 27A(b).

But the TGX Defendants have waived any claim-preclusion argument by failing to raise it in the district court. Our thorough search of the record reveals no mention of claim preclusion by the court's October 1991 judgment, and we refuse to consider it for the first time on appeal. *See Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir.1992) (failure to present res judicata argument to district court usually prevents appellate court from addressing the issue); *see also Aluminum Prod. Distrib., Inc. v. Aaacon Auto Transp., Inc.*, 549 F.2d 1381, 1384 (10th Cir.1977) (where a party asserted res judicata for the first time in a new-trial motion, "the district court was not bound by any [prior] judgment," and the appellate court refused to consider any preclusive effect on appeal).

We come to the central question of both cases: the constitutionality of § 27A(b).

B. WHETHER THE CONSTITUTION PROTECTS INDIVIDUALS OR THE JUDICIARY FROM § 27A(B)

Congress' authority to establish limitations periods for securities-fraud claims cannot be disputed. *See*

Musick, ___ U.S. at ___, 113 S.Ct. at 2089-2090. Section 27A(b) is controversial exclusively for its retroactivity.[9] While the Constitution proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. CONST. art. I, § 9; *Mahler v. Eby*, 264 U.S. 32, 40, 44 S.Ct. 283, 286, 68 L.Ed.549 (1924).

The PMLI Defendants and TGX Defendants (collectively Defendants) argue that the Supreme Court's precedent and the structure of the Constitution establish that § 27A(b) unconstitutionally affects individuals and the federal judiciary. The district courts agreed with them. We do not.

1. Individual Rights

The Constitution's Fifth Amendment prohibits Congress from depriving any person of property without due process of law. The Defendants claim that § 27A(b) contravenes the Fifth Amendment by compromising two of their property rights as recognized by the Supreme Court.

a. The Right to a Final, Nonappealable Judgment

Each of the defendants in these cases (collectively Defendants) possessed final, nonappealable judgments

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[9] A retroactive statute "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV.L.REV. 692, 692 (1960) (hereinafter *Constitutionality of Retroactive Legislation*).

dismissing the plaintiffs' § 10(b) claims. Unlike § 27A(a), § 27A(b) effectively nullifies these judgments, so the cases addressing the constitutionality of § 27A(a) have nothing to say about whether § 27A(b) unconstitutionally abrogates any right to a final judgment.[10] For guidance on this question, we turn to the Supreme Court.

The Defendants rely upon *McCullough v. Virginia*, 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed. 382 (1898) and its progeny to argue that § 27A(b) cannot constitutionally take away their judgments. McCullough obtained a judgment against Virginia in 1892, but a Virginia appellate court reversed that judgment. *Id.* at ___, 19 S.Ct. at 106, at 135. Between the time of judgment and its reversal, Virginia's legislature repealed the statute that authorized McCullough's suit. When the Supreme Court agreed to hear McCullough's appeal, Virginia asked the Court to apply the new law repealing authorization for the suit and dismiss McCullough's appeal. *Id.* at 123-24, 19 S.Ct. at 142. The Court emphatically refused Virginia's request:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but

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[10] The only appellate courts to rule on the constitutionality of § 27A to date have upheld it as a means of changing the limitations period in *pending* § 10(b) cases. *Cooke v. Manufactured Homes, Inc.*, ___ F.2d ___, ___, 1993 WL 248257, at *8 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 1993 WL 156464, at *3 & n. 11 (1st Cir. May 19, 1993); *Berning v. A.G. Edwards & Sons*, 990 F.2d 272, 279 (7th Cir.1993); *Gray*, 989 F.2d at 1574; *Anixter v. Home-State Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir.1992); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1570 (11th Cir. 1992).

> when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id.[11]

Our research indicates that the Court has never applied this holding in *McCullough* to decide another case. Moreover, both before and after *McCullough*, the Court has decided cases with identical relevant facts according to a different rule.[12] Accordingly, we must

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[11] Before *McCullough*, the Court did not adhere to such an absolute rule. *See Freeland v. Williams*, 131 U.S. 405, 419, 9 S.Ct. 763, 767-68, 33 L.Ed. 193 (1889) (sustaining a state law which invalidated a final judgment for damages in a trespass action); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431, 15 L.Ed. 435 (1855) (accepting *"as a general proposition . . .* especially as it respects adjudication upon the private rights of parties," that legislation "cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff") (emphasis added).

[12] In *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), Chief Justice Marshall explained:

> [I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110. Almost two hundred years later, *Schooner Peggy* remains good law. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 846, 110 S.Ct. 1570, 1581-82, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring) (reciting history of the Court's adherence to *Schooner Peggy* while advocating a rule requiring a

carefully scrutinize *McCullough's* rationale in assessing the precedential value of its broad statement concerning rights vested by judgment.

The *McCullough* Court did not explicitly ground its holding in the Constitution. In subsequent decisions, however, the Court explained that the Fifth Amendment's Due Process Clause is the source of constitutional protection for judgments, including the one that belonged to McCullough. *E.g., Hodges v. Snyder,* 261 U.S. 600, 602, 43 S.Ct. 435, 436, 67 L.Ed. 819 (1923). Thus, we decide this case according to the jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation. The Defendants stress a "vested rights" theory exemplified by *McCullough,* but we find talk of vested rights to merely state due process

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clear manifestation of legislative intent before courts will recognize retroactive legislation); *see also Griffith v. Kentucky,* 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6 (judgment is final for purposes of the constitutional prohibition on retroactive criminal legislation only when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). But in *McCullough,* the Court ignored *Schooner Peggy* and the fact that McCullough's case was pending on appeal when Virginia's legislature changed the law, deciding instead that the law applicable to a case "freezes" at the time the trial court renders its judgment. 172 U.S. at 124, 19 S.Ct. at 142 ("The writ of error to the court of appeals of [Virginia] brought the validity of [the trial court's] judgment into review, and the question presented to that court was whether, *at the time it was rendered* it was rightful or not.") (emphasis added). The *McCullough* Court may have understood *Schooner Peggy* to apply only to Article III courts, and ignored it for this reason.

conclusions, and thus unnecessarily confusing. The Court explains:

> the words "vested right" are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution.

Campbell v. Holt, 115 U.S. 620, 628, 6 S.Ct. 209, 213, 29 L.Ed. 483 (1885). A seminal treatise recognizes what has happened when courts have departed from the Constitution in search of an amorphous "vested rights" theory:

> Judicial opinions are full of standards which purport to govern decision[s] concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested."

NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.05, at 364-65 (C. Sands 4th ed. 1986); *accord Constitutionality of Retroactive Legislation*, 73 HARV.L.REV. at 696. We waste no further time with the "vested rights" language, and turn to due process.

When the Court rendered *McCullough*, it may have held the absolutist view, indicated by the statement quoted above, that the Due Process Clause protects all final judgments from retroactive legislation. But the Court has retreated from this view. The Court permits retroactive legislation to annul private judgments that affect public rights, *Hodges*, 261 U.S. at 602, 43 S.Ct. at 436, or private injunctions upon changed circumstances. *System Federation No. 91, Ry. Employees' Dept., AFL-CIO v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961) (modifying a permanent injunction to conform with subsequently-enacted amendments to the Railway Labor Act). The dispositive retreats from any absolute *McCullough* rule, however, come in *Fleming v. Rhodes*, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976).

In *Fleming*, landlords obtained valid final judgments from a Texas court entitling them to evict certain tenants upon the lapse of wartime price regulations. Congress cured the lapse within two months, and included a law which prohibited the eviction of the tenants with its extension of price regulations. 428 U.S. at 103 n. 3, 67 S.Ct. at 1141 n. 3. A price-control administrator asked a federal district court to apply this law to enjoin the landlords and state officials from executing their judgments, but the district court held that the federal statute violated the Fifth Amendment's Due Process Clause. *Id.* at 102, 67 S.Ct. at 1141-42. The Supreme Court reversed, explaining that

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." *The rights acquired by judgments have no different standing.* The protection of housing accommodations in defense-areas through the price control acts may be accomplished by the [administrator] notwithstanding these prior judgments. The preliminary injunctions should have been granted.

Id. at 107, 67 S.Ct. at 1144 (footnotes omitted and emphasis added), *cited with approval in Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 & n. 6, 79 S.Ct. 141, 146 & n. 6, 3 L.Ed.2d 132 ("[A]ny 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.").

Usery arose from Congress' efforts to provide compensation to coal miners and their survivors. The disputed legislation establishes an administrative procedure under which victims of the disease known as "black lung" and their survivors may collect benefits from coal companies, mandates certain presumptions against the coal companies, and operates retroactively. 428 U.S. at 9, 96 S.Ct. at 2889-90. The companies argued that the statute unconstitutionally deprived them of their property because it imposed upon them "an unexpected liability

for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time." *Id.* at 15, 96 S.Ct. at 2892. The Court responded:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . .
>
> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect. . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming v. Rhodes*. . . .

Id. at 15-16, 96 S.Ct. at 2892-93 (citations and footnotes omitted). The Court then assessed the practical consequences of the Act's retrospective imposition of liability and concluded that this imposition "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . . " *Id.* at 18, 96 S.Ct. at 2893.

The Defendants would have us distinguish *Fleming* and *Usery* on the ground that the Court in neither case permitted a retroactive statute to upset a final, nonappealable judgment; they maintain that the rights created by judgments are sacrosanct above other due process

rights, and that the *McCollough* rule endures for judgment-based rights. This argument fails to distinguish *Fleming* or *Usery*.

While the *Fleming* Court noted that the retroactive legislation which it upheld only compromised the landlords' ability to *enforce* their judgment rights as opposed to any compromise of the rights themselves, 428 U.S. at 106, 67 S.Ct. at 1144, the Court has also recognized (as do we) that the removal of a remedy has the same effect as the removal of a right. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) ("[I]t is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion."); *Lynch v. United States*, 292 U.S. 571, 580, 54 S.Ct. 840, 844, 78 L.Ed. 1434 (1934) ("Contracts between individuals or corporations are impaired . . . whenever the right to enforce them is taken away or materially lessened.").

Usery teaches that Congress can, under some circumstances, create private civil liability for past acts. We recognize nothing in the *Usery* Court's analysis that would limit Congress from retroactively creating liability for securities fraud if it justified this retroactive effect with reasons comparable to those recited in *Usery*. *See* 428 U.S. at 18, 96 S.Ct. at 2893-94. Because *Usery* allows Congress to avert questions of judgment rights altogether, there is no due process reason why Congress cannot reach the same result by upsetting a judgment.

Moreover, FED.R.CIV.P. 60(b) itself destroys the Defendants' position that final, nonappealable judgments confer sacrosanct due-process rights on individuals. Rule 60(b) permits courts to "relieve a party . . . from a final

judgment . . . for . . . any . . . reason justifying relief from the operation of the judgment." The Court has repeatedly acknowledged that Rule 60 "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.' " *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988) (citation omitted). The Tenth Circuit is especially likely to disturb final judgments under Rule 60(b) upon subsequent changes in the law: "a change in relevant case law by the United States Supreme Court warrants relief under Fed.R.Civ.P. 60(b)(6)." *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir.1989).

Rule 60(b) has spawned an extensive jurisprudence; no doubt remains as to its constitutionality. And we know of nothing to indicate that an individual holds any greater constitutional right against one branch of government than she holds against another. This reasoning establishes that, despite *McCullough*, judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation.

It is not our place to state general rules as to when the Due Process Clause permits Congress to disturb judgments. We limit our inquiry to the facts before us. Fortunately, the Court provides ample guidance in *Donaldson*. *See* 325 U.S. at 311-16, 65 S.Ct. at 1141-43.

Donaldson sued a securities broker under Minnesota statutory and common-law fraud theories. A state judge ruled that the broker violated the Minnesota securities statute and that Donaldson timely filed his claim because his absence from the state tolled Minnesota's limitations

period. Minnesota's Supreme Court held the latter ruling erroneous, and remanded for further proceedings. *Id.* at 306, 65 S.Ct. at 1138. Meanwhile, Minnesota's legislature enacted a limitations statute which permitted any securities fraud claim to be brought within one year of the statute if the securities were delivered more than five years before the statute's enactment date. Donaldson met the five year delivery requirement and availed himself of the new statute in Minnesota's courts. *Id.* at 308, 65 S.Ct. at 1139. The broker appealed to the Supreme Court, arguing that Minnesota deprived him of due process by applying the new limitations period to him. We quote extensively from the Court's unanimous refutation of this argument because we find it applicable here:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
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> . . . .

> . . . . The Fourteenth Amendment [Due Process Clause] does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression. . . . Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication.

Id. at 314-15, 65 S.Ct. at 1142-43 (citations and footnotes omitted).

The Defendants understandably stress the last phrase of the quoted passage, and observe that while *Donaldson* permits a legislature to retroactively change limitations periods, it says nothing about whether a legislature can divest a party of a final judgment. The problem with this argument is that *Donaldson* predates both *Fleming* and *Usery*, which we understand to establish that Congress may upset final judgments under some circumstances. To decide whether § 27A(b) can constitutionally upset final judgments, we observe that the Court in *Donaldson*, *Fleming*, and *Usery* invariably considered *whether the legislature acted rationally toward the party asserting a due process violation* to determine whether retroactive legislation deprived those parties of rights without due process.[13]

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[13] Even before *Usery*, one commentator comprehensively surveyed the Court's decisions concerning the constitutionality of retroactive legislation, and concluded that three inquiries, none of them dispositive, inform the Court's rationality decisions: 1) the nature of the public interest served by the retroactive enactment; 2) the extent of the abrogation of the preenactment right; and 3) the nature of the right affected by a retroactive statute. *Constitutionality of Retroactive Legislation*, 73 HARV. L.REV. at 697, 711, 717. He considers a statute that retroactively upsets final judgments primarily under the third criteria, and explains:

> the Court has indicated that it would be reluctant to permit the legislature to interfere with a right which has been "adjudicated . . . in final and unreviewable determination." However, it must be remembered that this is only one of many considerations in determining the constitutionality of retroactive legislation, and in any given case, the Court may deem the interests in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages

In *Fleming*, the Court understood the landlords asserting due process rights to have taken advantage of an inadvertent two-month lapse in price-control regulation of defense-area housing during wartime, and held that Congress could rationally exercise its commerce authority to deny them this advantage. 428 U.S. at 106, 67 S.Ct. at 1143-44. In *Usery*, the Court analyzed the effect of the retroactive legislation on the coal companies to determine whether the legislation "me[t] the test of due process" and concluded that the legislation was "justified as a rational measure to spread the costs of the employees' disabilities." 428 U.S. at 16, 96 S.Ct. at 2893. Likewise, as we quote above, the *Donaldson* Court carefully considered the effect of the retroactive limitations statute on the broker before holding that Minnesota's legislature worked no injustice. 325 U.S. at 315-16, 65 S.Ct. at 1143. And recently, the Court upheld a statute that retroactively assessed a fee for use of the Iran-United States Claims Tribunal against a due process challenge by applying this standard: "the test of due process" for "[t]he retroactive aspects of legislation" is met if "the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States v. Sperry Corp.*, 493 U.S. 52, 64, 110 S.Ct. 387, 396, 107 L.Ed.2d 290 (1989) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984)).

Donaldson frees us from speculating as to the bounds of due-process rationality when a legislature promulgates

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> of such application. Such a case was *Fleming v. Rhodes*. . . .

Id. at 718-19.

retroactive laws. Like the statute at issue in *Donaldson*, § 27A(b) restores a remedy that PMLI and Simmons lost through lapse of time. Like the fraud-based cause of action at issue in *Donaldson*, the Defendants' conduct would not have been different if they would have foreseen § 27A(b). Like the effect of the retroactive legislation at issue in *Donaldson*, § 27A(b) subjects the Defendants to a lawsuit.

As a matter of practical effect on the parties, § 27A(b) differs from the *Donaldson* legislation in one important respect. The *Donaldson* Court characterized the broker's expectation that the limitation law would remain as it was when suit was filed as a "legitimate hope[ ]," yet held this expectation insufficient to render Minnesota's retroactive limitations statute violative of due process. *Id.* Section 27A(b) represents Congress' complementary view that courts should honor the expectations of plaintiffs and defendants as they ascertained § 10(b) limitations law upon the filing of these suits before *Lampf*. Section 27A(b) fulfills the hopes that the *Donaldson* Court found legitimate, and is thus a stronger candidate for retroactivity than the statute upheld by the Court; strong enough, we hold, to upset the Defendants' final, nonappealable judgments.[14]

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[14] By this statement, we recognize that § 27A(b) should survive any heightened scrutiny required for retroactive legislation that upsets a judgment. We do not imply that retroactive legislation necessarily receives heightened scrutiny if it upsets a final judgment. A judgment for money is a species of property right, and we see no reason why the Constitution accords any more protection to an individual's right to her money when this right is represented by a judgment than when this right is

b. The Right to a Statute of Repose

The Defendants argue that even if Congress can legitimately upset their judgments with § 27A(b), the statute still contravenes due process because it creates civil liability for past acts. Their argument rests on *William Danzer & Co. v. Gulf & S.I.R. R.*, 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925), where the Court distinguishes between time-bar statutes that bar the *remedy* of suit in court, and those that extinguish the *liability* altogether. *Id.* at 637, 45 S.Ct. at 613; *see also Donaldson*, 325 U.S. at 312 n. 8, 65 S.Ct. at 1141 n. 8 (distinguishing *Danzer* according to its remedy/liability dichotomy). If a time-bar statute extinguishes liability, the *Danzer* Court held that a legislature cannot constitutionally amend such a statute to revive liability once extinguished. 268 U.S. at 637, 45 S.Ct. at 613. To do so would "retroactively . . . create liability" and thus "deprive the defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

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represented by a savings passbook. *See Tonya K. by Diane K. v. Board of Educ. of Chicago*, 847 F.2d 1243, 1247 (7th Cir.1988) ("Once the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other."). The Supreme Court, this court, and others have consistently permitted legislatures to retroactively affect individuals' rights to money by applying a rationality standard. *See Sperry*, 493 U.S. at 65, 110 S.Ct. at 396-97; *Pension Benefit Guar. Corp.*, 467 U.S. at 730, 104 S.Ct. at 2718; *Usery*, 428 U.S. at 17, 96 S.Ct. at 2893; *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 511-18, 58 S.Ct. 1025, 1031-34, 82 L.Ed. 1490 (1938); *Hoffman v. City of Warwick*, 909 F.2d 608, 618-19 (1st Cir.1990); *Fust v. Arnar-Stone Lab., Inc.*, 736 F.2d 1098, 1100 (5th Cir.1984); *DiPippa v. United States*, 687 F.2d 14, 19 (3d Cir. 1982).

The Defendants point to the *Lampf* Court's distinction between a one-year statute of limitation and a three-year statute of repose, and its holding that Congress effectively created this time-bar structure in 1934. *See* ___ U.S. at ___, 111 S.Ct. at 2780. They observe that, like the statute at issue in *Danzer*, the three-year repose period recognized by the *Lampf* Court is an absolute bar not subject to equitable tolling. *Compare id.* at ___, at 2782 *with Danzer*, 268 U.S. at 637, 45 S.Ct. at 613. From this, they reason that Congress in 1934 enacted an absolute three-year limit *on liability* for § 10(b) violations. Because § 27A(b) operates in these cases to lift this three-year outside limit, the Defendants argue that the statute "retroactively . . . creates liability" in contravention of due process according to *Danzer*.

As a preliminary matter, we note that the *Usery* Court squarely held that Congress may retroactively create liability for past acts, and thus compromises *Danzer's* holding that such legislation *per se* contravenes due process. *See Usery*, 428 U.S. at 16, 96 S.Ct. at 2893 (legislation is not unlawful solely because "the effect of the legislation is to impose a new duty or liability based on past acts") (citations omitted). The Court has also questioned the continued validity of a dichotomy between remedy and right, at least where extinction of the remedy has the same effect as extinction of the right. *See Donaldson*, 325 U.S. at 314, 65 S.Ct. at 1142; *see also Lynch*, 292 U.S. at 580, 54 S.Ct. at 844. And the last time a party asked the Court to apply *Danzer*, the Court did not even make a determination as to whether the time-bar statute at issue affected remedy or liability. *International Union of Elec. Radio & Mach.*

Workers v. Robbins & Myers, Inc., 429 U.S. 229, 244, 97 S.Ct. 441, 450-51, 50 L.Ed.2d 427 (1976).

But even if *Danzer* remains good law, it does not help the Defendants. *Danzer* and its progeny are inapposite to statutes that bar remedies, while leaving liability intact. We need look no further than *Lampf* to determine whether the three-year statute of repose asserted by the Defendants bars liability.

The *Lampf* Court strove for crystal clarity in stating its holding: "[T]he governing standard for an action under § 10(b) [is] the language of § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e)." ___ U.S. at ___ n. 9, 111 S.Ct. at 2782 n.9. Section 9(e) as passed by Congress in 1934, provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

This language unequivocally bars an action to enforce a liability, and says nothing about the continued existence of that liability. Nowhere does the *Lampf* Court even imply that the absolute three-year statute of repose extinguishes liability under § 10(b). We hold that it does not.

This holding conflicts with the Tenth Circuit's holding in *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420, 1434 (10th Cir. 1991) that § 13 of the 1933 Act limits liability and not remedy. The *Lampf* Court relied upon § 13 to hold that § 9(e) governs § 10(b) limitations periods, yet mentioned nothing about limitation of liability. ___ U.S. ___ & n. 7, 111 S.Ct. 2780 & n. 7. And like § 9(e), the language of § 13 unequivocally indicates a

limitation of remedy, not of liability.[15] We disagree with the *Anixter* court's opposite conclusion.

The Defendants wrongly assume that a statute of repose must go to liability rather than remedy. *See City of El Paso v. Simmons*, 379 U.S. 497, 508 n. 9, 85 S.Ct. 577, 582 n. 9, 13 L.Ed.2d 446 ("[T]he statute of repose challenged here is an alteration of remedy rather than obligation."). They are also mistaken that a time-bar statute limits liability merely because a legislature structures it as an absolute bar that is not subject to equitable tolling. In *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir.1990), the court discussed § 13 as follows:

> Courts say that equitable tolling does not apply under § 13, but this is not strictly accurate. It is better to say that equitable tolling and related doctrines do not extend the period of limitations by more than the two-year grace period § 13 allows. Congress did not obliterate these valuable doctrines so much as it set bounds on the length of delay.

Id. at 1391 (citations omitted). Rather than assess whether a statute is characterized as one of repose or limitation, or whether it is subject to equitable tolling, the relevant inquiry under *Danzer* is whether the legislature intended liability or remedy to be extinguished by a time bar.

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[15] Section 13 provides:

> In no event shall any such action be brought to enforce a liability created under § 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under § 77*l*(2) of this title more than three years after the sale.

15 U.S.C. § 77m.

Donaldson, 325 U.S. at 311 n. 8, 65 S.Ct. at 1141 n. 8. The primary evidence of this intent is, of course, the language of the statute.[16] In this case, we understand Congress to have decided in § 9(e) that the three-year time bar goes to remedy only.

Accordingly, the Defendants have failed to establish that § 27A(b) unconstitutionally deprives them of any right.

2. *Judicial Authority*

The Defendants next invite us to strike § 27A(b) as an affront to our Article III authority even if it does not contravene their constitutional rights. Other courts have considered some of the exact arguments made by the Defendants, and we draw on their wisdom before reaching the Defendants' novel contentions.

a. *Beam* and *Klein*

The Defendants present the same *Beam* argument that the district court describes in *Simmons*, 786 F.Supp. at 592-94, and the Ninth Circuit describes in *Gray*, 989 F.2d at 1571-72. We adopt the Ninth Circuit's analysis rejecting this argument insofar as it explains why any constitutional rule articulated in *Beam* does not limit Congress' powers under Article I. *Id.* at 1572; *accord Cooke*, ___ F.2d

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[16] The Ninth Circuit has distinguished *Danzer* by applying a presumption that time bar statutes "go to matters of remedy only." *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir.1982).

at ___, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 277-78. The Defendants also argue that § 27A(b) affects the outcome of cases without changing the law in violation of the rule announced in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871). We adopt the analysis of the Eleventh Circuit in *Scientific-Atlanta*, 971 F.2d at 1572, which explains that § 27A respects *Klein* by changing the law. *Accord Cooke*, ___ F.2d at ___, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 278-79; *Gray*, 989 F.2d at 1568-70; *Anixter*, 977 F.2d at 1544-46.

b. Pure Retroactivity

The Defendants also contend that Article I does not confer authority upon Congress to enact purely retroactive legislation. We view such a blanket prohibition as tantamount to a civil Ex Post Facto Clause, something that the Court has explicitly refused to recognize. *See Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 743 n. 4, 98 L.Ed. 911 ("The Court . . . has undeviatingly enforced the . . . position, first expressed in *Calder v. Bull*," that "the *ex post facto* Clause applies only to prosecution for crime. . . . It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.") (citation omitted); *cf. Cummings v. Bostwick*, 481 F.Supp. 1251, 1254 & n. 6 (D.N.H.1980) (the constitutions of Colorado, Georgia, Idaho, Missouri, New Hampshire, Ohio, Tennessee and Texas explicitly prohibit all retroactive legislation).

To the contrary, the Court has held that a statute is not unconstitutional merely for its retroactivity. *See Usery*, 428 U.S. at 19, 96 S.Ct. at 2893; *see also Scientific-Atlanta*,

971 F.2d at 1573 (rejecting argument that § 27A transgresses separation of powers doctrine because it is purely retroactive). The Defendants do not adequately distinguish *Usery* by explaining that the statute at issue in that case had some prospective effect. The *Usery* Court nowhere predicates its blessing of retroactive legislation on an associated prospective component. Indeed, the Court has before upheld purely retroactive legislation against a separation-of-powers challenge. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 424, 100 S.Ct. 2716, 2745, 65 L.Ed.2d 844 (1980). The Constitution imposes no bar on purely retroactive legislation *per se*.

c. Final Judgments

Lastly, the Defendants assert that § 27A(b) unconstitutionally usurps judicial authority by upsetting final judgments.[17] They say that § 27A(b) places Congress in the position of a super-appellate court, exercising review authority over the Supreme Court and its decisions in *Lampf* and *Beam*.

To define the constitutional separation of legislative and judicial authority, the Court focuses upon "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 106 S.Ct. 3245, 3257, 92 L.Ed.2d 675 (1986). Under this standard, we find § 27A(b) harmless.

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[17] The Ninth Circuit pretermitted this question in *Gray*. *See* 989 F.2d at 1571.

With § 27A(b), Congress did not overrule decisions of the Supreme Court. As we have held through *Scientific-Atlanta*, Congress changed the law after final judgment in *Lampf* and *Beam*, giving plaintiffs a new right to assert in court through a reinstatement motion. The Defendants understandably claim a violation of *their* constitutional rights by this action, but § 27A(b) takes no authority from the judiciary. Most significantly, § 27A(b) leaves the final resolution of securities-fraud disputes to the courts – we will decide, indeed are here deciding, which controversies will end in dismissal despite § 27A(b). If we understood a statute's purpose to be the reversal of results in particular controversies between private individuals, we would strike the statute as violative of our authority to decide cases. *See, e.g., United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648, 22 L.Ed. 772, 773-74 (1875) (finding that the Treasury Secretary invaded judicial authority by offsetting a court's judgment with claimed, but unlitigated tax liability). But § 27A(b) is innocent on this score.

By upsetting final judgments, § 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done. In *Sioux Nation*, the Court held that the Constitution does not forbid Congress from mandating that a controversy continues when the Court says that it is done.

The Sioux Nation brought a Fifth Amendment takings claim against the United States because our government breached a treaty obligation to reserve the Black Hills of South Dakota to the Sioux. The United States Court of Claims dismissed the Sioux Nation's claim for

interest on the value of the seized property as barred by res judicata. *United States v. Sioux Nation of Indians*, 207 Ct.Cl. 234, 518 F.2d 1298, 1306 (1975). The Supreme Court denied certiorari. 423 U.S. 1016, 96 S.Ct. 449, 46 L.Ed.2d 387 (1975). Three years later, Congress directed the Court of Claims to review the claim's merits without consideration of res judicata. *See* 25 U.S.C. § 70s(b); 448 U.S. at 389, 100 S.Ct. at 2727. After the Court of Claims ruled in favor of the Sioux Nation, the government appealed, asserting that § 70s(b) violates the constitutional separation of legislative and judicial authority. The Court upheld § 70s(b), permitting Congress to say that a controversy continues after the Court has said that it does not. 448 U.S. at 405, 100 S.Ct. at 2735-36; *see also Tonya K.*, 847 F.2d at 1247 (citing *Sioux Nation* for the proposition that "Congress may invite a court to reconsider even when it may not dictate the outcome").

Schooner Peggy and its extensive progeny also represent compelling evidence that the Constitution permits Congress and the judiciary to share authority in deciding when a court is finished deciding a particular controversy between individuals. *See* 5 U.S. (1 Cranch) at 110. With the exception of *McCullough*,[18] the Court has repeatedly observed Chief Justice Marshall's admonition that appellate courts must decide cases according to the law that exists when they decide, not the law that existed when the lower court rendered its decision.

In an extreme and stringent application of this rule, the Court rendered *149 Madison Avenue Corp. v. Asselta*,

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[18] *See* note 12, *supra*.

331 U.S 795, 67 S.Ct. 1726, 91 L.Ed. 1822 *modifying*, 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947). The *149 Madison Avenue* Court had affirmed a judgment for overtime pay due plaintiffs. 331 U.S. at 209, 67 S.Ct. at 1184. But before the time for rehearing had run, Congress retroactively created a defense for the defendants, who asked the Court to reconsider its affirmance in light of the change in law. The Court changed its judgment from an affirmance to a remand so that the district court could consider the case in light of the new law. 331 U.S. at 795, 67 S.Ct. at 1726. The district court eventually entered judgment for the defendants. *Asselta v. 149 Madison Ave. Corp.*, 90 F.Supp. 442 (S.D.N.Y.1950).

Of course, the rule announced in *Schooner Peggy* does not depend on whether the intervening law helps a particular party. Courts must apply the new law regardless of whether it ends a case that the court otherwise would have remanded for further proceedings. Thus, we interpret *Schooner Peggy* to support the constitutional proposition that Congress and the judiciary share authority to decide when the judiciary's word on a controversy is its last.

The Defendants have articulated no constitutional reason why these controversies should not continue.

III. CONCLUSION

We REVERSE the orders of the district courts and reinstate the cases. We REMAND for further proceedings consistent with this opinion.

TGX CORP.

v.

Gaylon SIMMONS, et al.

CONSOLIDATED WITH

Gaylon SIMMONS, et al.

v.

J.C. TEMPLETON, et al.

Civ. A. Nos. 87-5298, 90-0849.

United States District Court,
E.D. Louisiana.

March 18, 1992.

BEER, District Judge.

Plaintiffs in civil action 90-0849 have filed a motion to reinstate their previously dismissed claims. Plaintiffs' motion was heard on February 19, 1992. Defendants' opposition to plaintiffs' motion involves a constitutional challenge to a Congressional statute. Consistent with Local Rule 1.10, the court has therefore withheld ruling until the Attorney General has had an opportunity to address the constitutional issues presented. The Attorney General has now notified the court that it does not wish to intervene in this matter. Accordingly, the court now rules as follows:

I. BACKGROUND

In November 1986, the Simmons sold their full interest in LEDCO, Inc., to TGX Corp. (TGX) for approximately $21,000,000. The Simmons received $11,000,000 in cash; 300,000 shares of preferred TGX stock, valued at

approximately $3,000,000; real property; forgiveness of a $1,000,000 debt they owed to LEDCO; and, deferred consideration of $5,000,000 plus interest, to be paid in annual installments.

The Simmons contend that, because the TGX stock has proven worthless and none of the deferred payments has been made, they have received only $13,000,000 instead of the expected $21,000,000. The Simmons claim their $8,000,000 in damages was caused by their reliance on TGX's financial statements in agreeing to the LEDCO sale. The Simmons claim the statements did not disclose the existence of a lawsuit pending against TGX, which caused the devaluation of TGX stock and rendered TGX unable to honor its deferred payment obligations. TGX was eventually forced into bankruptcy.

TGX sued the Simmons in 1987 ("1987 suit"), and the Simmons counterclaimed alleging violations of the Securities Act of 1933 ("1933 Act"), the Securities Exchange Act of 1934 ("1934 Act") and Louisiana Blue Sky law. The suit was automatically stayed when TGX filed for bankruptcy in February 1990. On March 8, 1990, the Simmons filed suit against TGX's individual directors, and its law and accounting firms ("1990 suit"), alleging violations of section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and Louisiana Blue Sky law, as well as post-sale tortious interference with contract and breach of fiduciary duties.

The individual directors and TGX's law firm immediately moved to dismiss the 1990 suit, claiming the Simmons' federal claims were time-barred by *Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321

(1991). The Court in *Lampf* borrowed from another section of the 1934 Act and held that private actions under section 10(b) of the 1934 Act, and Rule 10b-5 promulgated thereunder, are subject to a one-year-from-discovery statute of limitations and a maximum three-year-from-transaction period of repose. *Id.* at 2780-81.

The Simmons thereafter admitted that *Lampf* time-barred their 1990 suit. Based on this admission, the court ordered defendants to prepare an order of dismissal and judgment. Before judgment was entered, however, the Simmons filed a motion to amend their counterclaim in the 1987 suit so as "to assert identical claims against the named defendants dismissed in the Proposed Order." The Simmons were concerned that entry of judgment in the 1990 suit would pose a res judicata bar to their proposed Fifth Amended Counterclaim in the 1987 suit. The Simmons therefore urged the court to dismiss their federal claims from the 1990 suit without prejudice. The court agreed, issuing a minute entry on August 5, 1991, dismissing the section 10(b) and Rule 10b-5 claims from the 1990 suit without prejudice. In a minute entry dated October 16, 1991, the court dismissed the Simmons' state law claims from the 1990 suit, also without prejudice.

On November 27, 1991, Congress passed S. 543, a bill which amends the 1934 Act by adding section 27A, 15 U.S.C. section 78aa-1. Section 27A provides, inter alia, a 60-day period for reinstating section 10(b) claims which had previously been dismissed as time-barred under *Lampf*. The president signed S. 543 into law, P.L. 102-242, on December 19, 1991. Based on section 27A, the Simmons now seek to reinstate the 10(b) and 10b-5 claims previously dismissed from their 1990 suit and, based

thereon, seek reinstatement of their allegedly pendent state claims as well.[1]

II. LAW AND ANALYSIS

Plaintiffs' motion is hereby DENIED. Although plaintiffs satisfy the facial requirements for reinstatement under section 27A, section 27A violates separation of powers principles by contravening the constitutional mandate established in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).

A. Section 27A Analysis

Plaintiffs satisfy the facial requirements for reinstatement under section 27A.[2] Section 27A(b) is herein specifically at issue, as this court dismissed plaintiffs' section

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[1] Technically, a judgment has never been entered dismissing plaintiffs' state claims from the 1990 suit. As stated in the conclusion to this minute entry, counsel for defendants are therefore jointly requested to submit a judgment dismissing plaintiffs' state claims.

[2] Section 27A amends the 1934 Act as follows:

Sec. 27A. (a) *Effect on Pending Causes of Action* – The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed in June 19, 1991.

(b) *Effect on Dismissed Cause of Action* – Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 –

(1) which was dismissed as time barred subsequent to June 19, 1991, and

10(b) and Rule 10b-5 claims on August 5, 1991. A plaintiff seeking reinstatement under section 27A(b) must prove (1) that he commenced a private civil action under section 10(b) before June 19, 1991; (2) that said action was dismissed as time-barred subsequent to June 19, 1991; and (3) that said action was timely filed under the limitations period applicable in the jurisdiction on June 19, 1991. Plaintiffs herein satisfy these requirements.

The First and Second Requirements: Plaintiffs satisfy the first and second requirements for reinstatement under section 27A(b). Plaintiffs satisfy the first requirement for reinstatement because they filed their action under section 10(b) prior to June 19, 1991. Plaintiffs filed their complaint in civil action 90-0849 on March 8, 1990. Plaintiffs also satisfy the second requirement for reinstatement because their action under section 10(b) was dismissed as time-barred after June 19, 1991. Statements from the bench in open court, and the court's judgment and order, demonstrate that plaintiffs' section 10(b) claims were dismissed because they were time-barred.

Defendants err when they claim plaintiffs voluntarily dismissed their section 10(b) and Rule 10b-5 claims. Defendants filed a notion to dismiss said claims immediately after the Court issued *Lampf*. Plaintiffs opposed

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(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

defendants' motion. Plaintiffs' thereafter withdrew their opposition, as it became clear that *Lampf* time-barred their claims. The court then dismissed plaintiffs' claims in open court, and ordered defendants to submit a conforming order and judgment. Defendants submitted a judgment which dismissed plaintiffs' claims with prejudice. Plaintiffs asked that the judgment be amended to dismiss their claims without prejudice, so as to avoid res judicata effects concerning a pending amendment to their counterclaim in the 1987 suit. The court granted plaintiffs' request, and dismissed their federal claims without prejudice. The court's minute entry, and the documents concerning it, do not mention voluntary dismissal under Federal Rule of Civil Procedure 41.

Plaintiffs thus satisfy the first and second requirements for reinstatement under section 27A(b).

The Third Requirement: Plaintiffs also satisfy the third requirement for reinstatement under section 27A(b), because their action was timely-filed under the laws of this jurisdiction as they existed on June 19, 1991. Before *Lampf*, this jurisdiction applied the two year limitations period set by Louisiana Revised Statutes Annotated section 51:714(C)(1) (West 1987). *See Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988). The period set by section 51:714(C)(1) commences when " 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge' thereof. . . . Investors are not free to ignore 'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions in his securities transaction." *Id.* at 606-07 (citations omitted). Mr. Simmons' affidavit states that he learned of

defendants' alleged concealment of the pending TGX litigation in March 1989, so as to render timely the March 1990 filing of plaintiffs' suit.

Defendants have not offered viable evidence to refute plaintiffs' assertion that the 1990 suit was timely filed under section 51:714(C)(1). Defendants claim plaintiffs should have known of the pending TGX litigation as early as 1987, when defendants disclosed same in their required filings with the SEC. Plaintiffs' response to defendants' claim is two-fold: Plaintiffs claim (1) TGX's 1987 10-K only briefly and vaguely referred to pending litigation, and thus did not create a "storm warning" sufficient to trigger the two-year limitations period; and (2) that even if the brief statement in TGX's 1987 10-K were sufficient to trigger the limitations clock, the 10-K was not actually filed with the SEC until March 25, 1988. Plaintiffs' second response is uncontested, and defeats defendants' claim that plaintiffs' action was not timely filed. Plaintiffs filed their action less than two years after defendants filed the 10-K form which defendants claim disclosed the pending TGX litigation. Plaintiffs action was thus timely filed even if the 10-K were sufficiently descriptive so as to commence the running of section 51:714(C)(1)'s limitations clock.

Plaintiffs thus satisfy all three requirements for reinstatement under section 27A(b). The court therefore now turns to the question of section 27A's constitutionality.[3]

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[3] The court was required to determine whether plaintiffs satisfied the facial requirements for reinstatement before it addressed section 27A's constitutionality. *See Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 2997, 86 L.Ed.2d 664 (1985) (" 'Prior

B. Constitutional Analysis

Section 27A is unconstitutional, as it violates established separation of powers principles. Congressional enactments are entitled to deference regarding their constitutionality, but section 27A cannot stand because, although Congress has changed the law, it has done so in a manner inconsistent with the constitutional mandate established in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).[4]

Congressional enactments are entitled to deference regarding their constitutionality, but said deference is not absolute. "It is of course true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid." *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988) (citations omitted). When courts are reviewing constitutional challenges to such statutes, however, "statutory construction may not be pressed 'to the

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to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' . . . 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' " (citations omitted)).

[4] Having concluded that section 27A violates separation of powers principles, the court declines to address defendants' claim that the application of section 27A would violate due process as well.

point of disingenuous evasion.' " *Id.* (citation omitted). The aforestated deference thus cannot sustain a congressional enactment that contravenes established constitutional principles.

Two related constitutional principles are herein at issue. The first principle is that while "Congress can *amend* or *repeal* any law . . . [it] cannot 'prescribe a rule for a decision of a cause in a certain way' where 'no new circumstances have been created by legislation.' " *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1315 (9th Cir.1990), *cert. granted*, ___ U.S. ___, 111 S.Ct. 2886, 115 L.Ed.2d 1051 (1991) (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147, 20 L.Ed. 519 (1871)) (emphasis in original). The second constitutional principle at issue is that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 2448, 115 L.Ed.2d 481 (1991). Section 27A does not contravene the first of these principles, but it does contravene the second and is thus unconstitutional.

Congress has changed the law with the enactment of section 27A: Section 27A represents a change in the law, such that Congress has not contravened the separation of powers principles established by *Klein* and its progeny. Before section 27A, all section 10(b) claims were properly subject to the limitations period announced in *Lampf* and made to apply retroactively by *Beam*. Section 27A then changed the law, by limiting *Lampf* to prospective application only.

Lampf and *Beam* together establish that all section 10(b) claims ever filed should have been subject to a "one-year-from-discovery-and-three-year-from-transaction" limitations period. *Lampf* announced this limitations period, *see* 111 S.Ct. at 2780-81, and *Beam* mandated that *Lampf* be afforded full retroactive effect. As explained in *Beam*, the *Lampf* Court was not making law, but rather, was " 'finding it' – discerning what the law *is*, rather than decreeing today what it is today *changed to*, or what it will *tomorrow* be." *Beam*, 111 S.Ct. at 2451 (Scalia, J., concurring) (emphasis in original). The limitations period "found" in *Lampf* thus did not represent a change in the law, but rather, a mere clarification what the law has always been. Courts such as the Fifth Circuit, which had previously applied other limitations periods to section 10(b) claims, had thus done so in error.

Lampf, through *Beam*, thus established what the law has always been, and section 27A changed that law. After *Lampf* and *Beam*, but before the enactment of section 27A, it was clear that section 10(b) claims filed pre-*Lampf* and post-*Lampf* were all properly subject to the limitations period stated in *Lampf*. Section 27A then rewrote the law, limiting *Lampf* to prospective application by stating that *Lampf* would not apply to section 10(b) claims filed before June 20, 1991. Section 27A stated that these pre-*Lampf* claims would once again be subject to the applicable jurisdiction's pre-*Lampf* limitations rule. Between June 20, 1991, and December 19, 1991, pre-*Lampf* claims were thus subject to the *Lampf* rule, while after December 19, 1991, said claims were subject to the applicable jurisdiction's pre-*Lampf* limitations rule. Section 27A thus changed the law, by altering the limitations period applicable to pre-*Lampf* claims.

Congress has thus changed the law, so as not to implicate the separation of powers principles established by *Klein* and its progeny. The court now turns to the question of whether Congress has changed the law in a permissible manner.[5]

B. *Section 27A contravenes the constitutional mandate established in* Beam: While Congress has changed the law, it has done so in a manner inconsistent with the constitutional mandate established in *Beam*. Section 27A thus violates separation of powers principles, such that it is unconstitutional and cannot be applied to reinstate plaintiffs' claims.

In *Beam*, the Court addressed the retroactive application of judicial precedent. Justice Souter, delivering the judgment of the Court, first outlined the retroactivity principles to which precedent had previously been subject. *Beam*, 111 S.Ct. at 2443-44. One such principle, described as "selective prospectivity," held that "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all

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[5] This court thus agrees with the court in *Bankard v. First Carolina Communications, Inc.*, 1992 WL 3694, at *6 (N.D.Ill. Jan. 6, 1992), which found that Congress has changed the law with the enactment of section 27A. This court disagrees with the *Bankard* court, however, to the extent it believed such a finding ended the separation of powers inquiry. Once a court finds that a congressional enactment has changed the law, the court must then review the enactment itself, to assure that its substance does not constitute an impermissible legislative encroachment on the judicial power. Thus, because this court has determined that section 27A has changed the law, the court must now consider whether section 27A changes the law in a manner consistent with established separation of powers principles.

others arising on facts predating the pronouncement." *Id.* at 2444.

Recognizing the inequity inherent in selective prospectivity, Justice Souter proceeded to abandon the principle in the civil context. Justice Souter began by stating that "selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Id.* For this reason, Justice Souter continued, the Court had already abandoned selective prospectivity in the criminal context. *Id.* at 2444-45 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987)). Justice Souter then explicitly adopted *Griffith* in the civil context, stating that "*Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere." *Id.* at 2446 (citation omitted). Justice Souter then concluded in strong terms, stating that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at 2448. Three separate concurrences confirm the Court's rejection of selective prospectivity. *See id.* at 2448-51 (White, J., concurring; Blackmun, J., concurring; Scalia, J., concurring).

The Court's rejection of selective prospectivity was rooted in article III of the constitution. While Justice Souter did not explicitly reference article III, his reliance on, and adoption of *Griffith* confirm that his opinion was constitutionally based. *Griffith* rested squarely on constitutional grounds, holding that article III required full

retroactive application of the Court's decisions to pending criminal cases. As the Court therein stated,

> failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is a settled principle that this Court adjudicates only "cases" and "controversies." See U.S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.

Griffith, 479 U.S. at 322-23, 107 S.Ct. at 713. Justice Souter's exhaustive reliance on *Griffith* thus confirms that his *Beam* opinion was of constitutional magnitude.

The concurrences in *Beam* further confirm that the Court's rejection of selective prospectivity was constitutionally based. Like Justice Souter, Justices White and Blackmun each relied heavily on *Griffith*, *see Beam*, 111 S.Ct. at 2448-50 (White, J., concurring; Blackmun, J., concurring), and thus ultimately on article III. The clearest constitutional pronouncement, however, came from Justice Scalia. In a concurrence joined by Justices Marshall and Blackmun, Justice Scalia stated that "[i]f the division of federal powers central to the constitutional scheme is to succeed in its objective . . . the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted." *Id.* at

2450 (Scalia, J., concurring). Justice Scalia first described the scope of Executive power, *see id.*, and then continued: "So also . . . '[t]he judicial power of the United States' conferred upon this Court . . . must be deemed to be the judicial power as understood by our common-law tradition. That is, the power 'to say what the law is,' not the power to change it." *Id.* at 2450-51 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)). Justice Souter's opinion for the Court, combined with the aforestated concurrences, thus establish that the Court's rejection of selective prospectivity was constitutionally based.

Beam thus reflects a judicial interpretation of the constitution, such that congressional enactments inconsistent therewith must fall. It is well-settled that the Court is the ultimate arbiter of the constitution, and that Congress cannot enact legislation contrary to the Court's constitutional doctrine. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78, 2 L.Ed. 60 (1803) ("It is, emphatically, the province and duty of the judicial department to say what the law is. . . . So, if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty."). Regarding the present case, *Beam* found unconstitutional the selective prospectivity principle that "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 111 S.Ct. at 2444. Thus, if section 27A triggers the selective prospectivity proscribed in *Beam*, section 27A must be found unconstitutional.

The court believes section 27A does effect the selective prospectivity constitutionally proscribed in *Beam*, such that section 27A is unconstitutional. By limiting *Lampf* to prospective application, Congress has contravened *Beam* by causing similarly situated litigants to be treated dissimilarly. Prior to *Lampf*, the *Lampf* plaintiffs and the current plaintiffs were similarly situated. The *Lampf* plaintiffs then had their claims dismissed based on the rule announced and applied therein. Thus, the *Lampf* Court "appl[ied] a new rule in the case in which it [was] pronounced." *Id.* The current plaintiffs, by contrast, are able to urge their claims because section 27A shields them from *Lampf* by reviving the jurisdiction's preexisting limitations rule. Congress has thus "return[ed] to the old [rule] with respect to all others arising on facts predating the pronouncement." *Id.* Congress has thus effected the exact selective prospectivity found unconstitutional in *Beam*. As such, section 27A must fall.[6]

Thus, although plaintiffs satisfy the facial requirements for reinstatement under section 27A, plaintiffs' motion must be denied because section 27A contravenes the constitutional mandate established in *Beam*.

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[6] The court's conclusion is consistent with the first Fifth Circuit case to apply *Beam*. In *Sterling v. Block*, 953 F.2d 198 (5th Cir.1992), the court considered whether *Davis Oil v. Mills*, 873 F.2d 774 (5th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 331, 107 L.Ed.2d 321 (1989), should be applied retroactively. Applying *Beam*, the court concluded "that because the holding in *Davis Oil* was applied retroactively to the parties in that case, it must be applied retroactively here." *Id.* at 199. Similarly in this case, "because the holding in *Lampf* was applied retroactively to the parties in that case, it must be applied retroactively here." Section 27A precludes this result, and thus it cannot stand.

III. CONCLUSION

It is hereby ADJUDGED, ORDERED and DECREED that plaintiffs' motion to reinstate is DENIED. Consistent with footnote 1, counsel for defendants are jointly requested to submit a judgment dismissing plaintiffs' state claims.

MINUTE ENTRY
BEER, J.
MAY 20, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TGX CORPORATION	CIVIL ACTION
VERSUS	NO. 87-5298
GAYLON D. SIMMONS, ET AL	SECTION M

CONSOLIDATED WITH

GAYLON D. SIMMONS, ET AL	CIVIL ACTION
VERSUS	NO. 90-0849
J.C. TEMPLETON ET AL	SECTION M

(Filed May 20, 1992)

Plaintiffs in Civil Action 90-0849 previously filed a motion to reinstate their dismissed federal and state law claims, pursuant to section 27(A) of the 1934 Securities Exchange Act. In a minute entry dated March 18, 1992, the court denied plaintiffs' motion on the grounds that section 27(A) violates the separation of powers. Plaintiffs thereafter filed a "Motion for New Trial or, alternatively, for Relief Pursuant to Rule 59." Said motion was heard on May 6, 1992, with the parties and the government each making oral presentations. The court then afforded all sides the opportunity to supplement their oral presentations with written memoranda. The deadline for submitting said memoranda has now passed, and accordingly the court now rules as follows.

I. Background

The factual background to this motion was presented in the court's March 18 minute entry. The only development since that date is that the court entered a final judgment dismissing plaintiffs' state claims on March 23, 1992.

II. Law and Analysis

Plaintiffs' motion is hereby denied. In addition to its prior ruling,[1] the court believes section 27(A)(b) violates due process by legislatively authorizing the upset of final judgments.[2]

Section 27(A)(b) impermissibly authorizes the upset of final judgments. Section 27(A)(b) authorizes the reinstatement of previously-dismissed actions upon timely motion, provided certain prerequisites are satisfied. Reinstatement is authorized regardless of whether a final judgment has been entered in the underlying action. This failure to distinguish between cases with and without

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[1] For reasons stated in its March 18 minute entry, the court maintains its belief that section 27(A) violates the separation of powers. The remainder of this minute entry addresses section 27(A)'s due process implications, an issue explicitly not addressed in the court's prior ruling. *See* March 18 minute entry, at n. 4.

[2] This issue could likewise be considered a separation of powers problem, to the extent it concerns Congress' attempt to undercut the judiciary. Whether it is characterized as a separation of powers or due process problem, however, does not alter the court's ultimate determination that section 27(A)(b) is unconstitutional.

final judgments causes section 27(A)(b) to run afoul of established due process principles.

It is well-settled that Congress cannot upset a final judgment. The legislature may not "take away rights which have once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898). *See also State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) ("the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby. . . . When they have passed into judgment, the right becomes absolute. . . . "); *Massingill v. Downs*, 48 U.S. (7 How.) 760, 767 (1849) ("no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment.").

The aforestated precedents make clear that final judgments give rise to vested rights, and that Congress cannot divest successful litigants of said rights. Movants contend that final judgments entered on litigants' behalves are not fully protected as a result of the passage of section 27(A)(b). Ultimately, such contentions must fail. The government concedes in its brief that the Supreme Court "has yet to decide whether a dismissal on statute of limitations grounds gives rise to vested rights." *Statement of Interest of the United States and the Securities and Exchange Commission* at n.6. Until the Supreme Court says otherwise, this court will follow the aforestated precedent, and decline movants' invitation to prioritize the

sanctity of final judgments based on the legal reasoning underlying their origin.[3]

III. Conclusion

It is hereby ADJUDGED, ORDERED and DECREED that plaintiffs' "Motion for New Trial or, alternatively, for Relief Pursuant to Rule 59" is DENIED.

/s/ Peter Beer
Peter Beer
United States District Judge

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[3] This court thus joins at least three other district courts which have denied motions to reinstate because section 27(A)(b) impermissibly upsets final judgments. *See Johnston v. CIGNA Corp.*, No. 90-B-177, at p. 3 (D. Colo. Mar. 20, 1992) ("because [section 27A(b)] calls for the reinstatement of claims finally adjudicated, it is unconstitutional as applied here"); *In re Brichard Securities Litigation*, No. 87-2987, 1992 WL 63399, at *9 (N.D. Cal. Mar. 27, 1992) ("Congress does not have the power to upset the final judgments of either the Supreme Court or the lower federal courts. . . . [Section 27A(b)] intrudes upon the exclusive power of the judiciary to adjudicate cases." (citations omitted)); *Plaut v. Spendthrift Farm, Inc.*, No. 87-438, at pp. 7-8 (D. Ky. Apr. 13, 1992) ("When a judgment becomes final, it is final for all purposes, regardless of its basis. . . . This court must conclude that § 27A(b) is an unconstitutional exercise of legislative power, and cannot be permitted to interfere with defendants' final judgment and their vested rights therein.").

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC., Defendants-Appellees.

No. 92-5591

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1993 U.S. App. LEXIS 19738

August 3, 1993, Decided

August 3, 1993, Filed

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of Kentucky.

DISPOSITION: AFFIRMED

JUDGES: Before: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL, Senior District Judge.* BATCHELDER, Circuit Judge, delivered the opinion of the court, in which CHURCHILL, Senior District Judge, joined. KEITH, Circuit Judge, delivered a separate opinion concurring in part and dissenting in part.

OPINION: ALICE M. BATCHELDER, Circuit Judge.

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* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

Appellants, the plaintiffs before the District Court, representing a large number of sometime investors, originally sued defendants on November 25, 1987, alleging violations of the securities laws, namely fraud and deceit in the sale of stock under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act")[1] and Securities and Exchange Commission Rule 10b-5.[2] Defendants owned "one of the Commonwealth's premier thoroughbred horse farms" (the District Court's characterization, to which we owe every deference) and issued stock in the enterprise in order to raise some thirty million dollars in cash; others of the named defendants were various legal and financial advisers to the venture. The appellants (or "shareholders") originally purchased their stock when defendants offered it for public sale in 1983.

For over three years, the pretrial litigation in the District Court proceeded apace. On June 20, 1991, however, the Supreme Court handed down *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), which applied a uniform Federal time limit from another section of the 1934 Act to that action and all private § 10(b) actions. Lampf provided a three year period of repose, running from the date of a fraudulent securities contract of sale, or a one year limitation period, running from the date of discovery of the fraud.[3]

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[1] 15 U.S.C. § 78j.

[2] 17 C.F.R. § 240.10b-5.

[3] Prior to *Lampf*, the Kentucky Blue Sky law provided a three year limitation period for this type of Federal securities action, running from the date of discovery. Ky. Rev. Stat. Ann.

The District Court, applying *Lampf* retroactively on the authority of *Beam Distilling Corp. v. Georgia*, 111 S. Ct. 2439 (1991), which was announced the same day as *Lampf*, dismissed the shareholders' claims with prejudice on August 13, 1991. The shareholders did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal.

In November 1991, Congress passed the FDIC Improvement Act of 1991, ("1991 Act") which, on a plaintiff's motion made within sixty days of the effective date of the statute, December 19, 1991, required the District Courts to reinstate claims which had been dismissed as a result of the application of the Federal statute of limitations announced in *Lampf*. The shareholders filed such a motion on February 11, 1992. While finding that under the statute the shareholders were entitled to have their claims reinstated, the District Court held the statute unconstitutional as applied and denied the motion. Since the portion of the 1991 Act which commands the District Court to reinstate the shareholders' dismissed cause of action violates the doctrine of separation of powers and deprives the defendants of their vested rights in the court's final judgment, we affirm.

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§ 292.480. Two Circuits had already adopted the Federal one year/three year period adopted in *Lampf*; others had applied State limitations periods. See *Lampf*, 111 S. Ct. at 2777 n.1 (citing cases).

II.

The disputed statutory provision of the 1991 Act provides:

> (b) Effect on dismissed causes of action
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> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 (1) which was dismissed as time barred subsequent to June 19, 1991,[4] and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such law existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

15 U.S.C. § 78aa-1.[5]

The statute's language is plain and unambiguous. It applies only to the claims of the parties in *Lampf* and to those lawsuits which were dismissed as a result of *Lampf's* retroactive application. The statute commands the Federal courts to reinstate cases which those courts have dismissed. Where the word "shall" appears in a statutory directive, "Congress could not have chosen stronger

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[4] The Supreme Court announced its decision in *Lampf* on June 20, 1991.

[5] Also known as "Section 27A." Subsection (a) of this provision retroactively applies the previously applicable statute of limitations to those cases filed before June 19, 1991 which remained pending in the courts. The parties do not dispute this subsection; we therefore do not address it.

words to express its intent that [the specified action] be mandatory. . . . " *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 2662 (1989).

Refreshingly, none of the litigants at our bar has suggested that § 27A means anything other than what it plainly says. This is certainly not a case in which the issue of separation of powers

> comes before the court clad, so to speak, in sheep's clothing: [where] the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.

Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). If Justice Scalia, the lone dissenter in *Morrison*, thought that the challenged independent counsel law was a wolf which came "as a wolf," *id.*, we think that § 27A comes as a camel, one that has forcibly and quite unapologetically thrust its nose into the tent of the judicial branch.

A. A brief historical background.

To answer the question upon which the constitutionality of § 27A hinges, we must reach far back into American legal history. During the first century or so of colonial government, legislative edicts requiring courts to reopen, vacate, rehear, or even reverse settled decisions upon the petition of the aggrieved losing party were not

uncommon.[6] Noting the apparent prevalence of legislative adjudication of private disputes and grievances in the early colonial period, historians have concluded that such action did not offend the legal or political sensibilities of the time.[7] However, these sensibilities changed considerably during the years following the outbreak of the Revolutionary War, particularly with the escalation of legislative interference in private disputes which occurred during the time of the Articles of Confederation, notably and most frequently to grant debtors "relief" from creditors.[8] "Once legislative interference in judicial

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[6] See Gordon S. Wood, Creation of the American Republic 154-55 (1969); Judicial Action by the Provincial Legislature of Massachusetts, *15 Harv. L. Rev. 208* (1901-02).

[7] See, for example, Creation, supra note 6 at 154 ("The assemblies in the eighteenth century still saw themselves . . . as a kind of medieval court making private judgments as well as public law. . . . Such assumptions of traditional gubernatorial and judicial authority . . . did not seem to be usurpations. . . . "); see also E.S. Corwin, 1 Corwin on the Constitution 59-60 (1981).

[8] Wood, supra note 6 at 404-07, 454. As an example, Professor Wood describes the problem which persisted in Vermont at this time:

> The legislature, charged the Vermont Council of Censors, was reaching for "uncontrolled dominion" in the administration of justice: becoming a court of chancery in all cases over 4,000, interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions involving bonds or debts, consequently stopping nine-tenths of all causes in the state. In their assumption of judicial power the legislators had determined every cause, said the Council, guided by no rules of law but only by their crude notions of

matters had intensified as never before in the eighteenth century, a new appreciation of the role of the judiciary in American politics [began] to emerge." *Id.* at 454.

The transformation of the legislature from its occasional role as an informal court of last resort, dishing out equitable relief to particularly aggrieved citizens, to a "department [which] is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," as James Madison described the legislative element of government in The Federalist 48, deeply concerned the fledgling Nation's leaders, most notably those who met in Philadelphia in 1787 to revise the Articles of Confederation. Their concern translated into many of the Constitution's specific enumerations of and limitations on power, as well as the "political truth" embodied in the document that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" and that "the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist 47 (James Madison).

Defending the Constitution against charges that its provisions did not ensure adequate separation among the branches, Madison explained that good government did not require its departments to be "toally separate and distinct from one another." The nature of the power exerted, not the person or body exerting it, mattered: "Where

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equity, "or in other words, according to their sovereign will and pleasure."

Id. at 407 (quoting Address of the Council of Censors, Feb. 14, 1786, in Slade, ed., Vermont State Papers at 537).

the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." Federalist 47. In the specific context of the separation between legislature and judiciary, he noted, "the entire legislature can perform no judiciary act"; pursuing the point, he quoted Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." *Id.*

In illustrating the dangers of the "encroaching spirit of power," Madison emphasized the dynamic counterbalancing the Constitution envisioned among the branches of government, which he immortalized concisely in declaring that "ambition must be made to counteract ambition." Federalist 48, 50. He cited first the example of Virginia, where that Commonwealth's constitution prescribed the separation of powers, but where Jefferson had complained that "no barrier was provided between these several powers." Federalist 48 (quoting Thomas Jefferson, Notes on the State of Virginia (1784)). Madison noted that Jefferson had observed, with concern, that the Virginia legislature had "in many instances, decided rights which should have been left to judiciary controversy. . . . " *Id.* Madison pointed out the same dangerous trend in Pennsylvania, where "the [State] Constitution had been flagrantly violated by the legislature in a variety of important instances," including where "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." *Id.* "The conclusion," Madison summarized,

> which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Id.

B. The Separation of Powers Applied and Enforced.

After the States ratified the Constitution, it did not take long for fears of legislative encroachment on the judiciary's sphere of action to be realized. In 1791, Congress enacted a scheme by which disabled Revolutionary War veterans could apply for pensions. Veterans were to make application to the Federal Circuit Courts, which would then accept (or reject) their assertions that they were actually veterans, and render judgment as to the amount of pension appropriate to their disabilities. However, Congress gave the Secretary of War the final say; he could deny pensions where he suspected "imposition or mistake." *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as described in 13 Charles A. Wright et al., Federal Practice and Procedure § 3529.1 at 302 (1984).

At that time, the Justices of the Supreme Court "rode circuit" and comprised the Federal Circuit Courts, sitting with District Court judges. The (then) five Justices of the Supreme Court were confronted with the pension act while sitting with three District Court judges on separate Circuit Court panels convened in New York, Pennsylvania, and North Carolina. Each panel independently and unanimously declined to hear the veterans' petitions, reasoning that for the courts to render judgments subject to

review by the Congress was violative of the separation of powers.[9] This result was in essence the Court's first invalidation of an act of Congress. No doubt recognizing the gravity of this situation, both the Pennsylvania and North Carolina panels sent letters, jointly authored by the sitting judges, to President Washington informing him directly of their respective decisions and explaining the reasoning behind their objections.[10]

The Justices sitting in New York noted

> [t]hat by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. . . . [The Act] subjects the decisions of these courts, made pursuant to

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[9] The U.S. Attorney General then brought a motion for a writ of mandamus before the Supreme Court at its next term, which the Court denied since the motion was made ex officio rather than on behalf of an actual petitioner. Unfazed, the Attorney General subsequently brought another motion for a writ of mandamus, this time on behalf of a particular applicant, William Hayburn, and asked the Supreme Court to order the courts to entertain the veterans' applications. The Court issued an opinion declaring that it would hold the motion under advisement until the next term; by that time, however, Congress had enacted an alternative system for providing the pensions. See *Hayburn's Case*, 2 U.S. 409.

[10] These letters, along with the opinion of the New York circuit panel, were published as a note to the Supreme Court's opinion issued in response to the Attorney General's second mandamus motion. While the Court did not specifically pass on the constitutionality of the act, as explained in note 9, the opinions rendered in *Hayburn's Case* "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison v. Olson*, 487 U.S. 654, 677 n.15 (1988).

> those [judicial] duties, first to the consideration and suspension of the secretary of war, and then to the revision of the Legislature; whereas, by the constitution, neither the secretary of war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

Hayburn's Case, 2 U.S. at 409-10 n.2.

Similarly, the Justices sitting in Pennsylvania went straight to the heart of the matter. They noted that "the people of the United States have vested in Congress all legislative powers granted in the constitution" and have vested in the courts "the judicial power of the United States." *Hayburn's Case*, 2 U.S. at 410 n.2.

> It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. . . . [The people] have placed their judicial power not in Congress, but in "courts."

Id. Holding that the Act required judges to carry out "business . . . not of a judicial nature," the Justices went on to explain how the Act, if executed as Congress prescribed, offended the separation of powers:

> [I]f . . . the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in

> the courts; and, consequently, with that important principle which is so strictly observed by the constitution of the United States.

Id. The North Carolina court echoed this interpretation:

> No decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested. . . .

Id. With this unprecedented, "painful" ruling, the Justices, some of whom had been at the Philadelphia Convention, made it clear that the Federal judiciary power, while defined in its reach by the Congress, could not be exercised by that body. The Court anchored its holding in the Constitution's succinct sentences vesting the legislative and judicial powers in their respective branches, and, necessarily, in the historical and theoretical understanding of the nature of the judicial power which had been incorporated into the Constitution.

III.

We have devoted several pages to *Hayburn's Case* and the background of the constitutional separation between the legislature and the judiciary, not to kill trees, but to illustrate that the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts, and to explain the Court's adherence to that rule as a protection

of the separation of powers. We search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgements rendered in cases between private litigants.[11] If the statute which gave rise to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, a fortiori. Reserving to Congress the power to "suspend" and "revise" decisions of the Supreme Court which had interpreted and applied valid Federal law would enable the Congress to sit as a "court of errors." In enacting § 27A, Congress has not simply reserved such power, as in *Hayburn's Case*, but actually exercised it. Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with

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[11] Excepting, of course, the various courts which have found § 27A constitutional. See, e.g., *TGX Corp. v. Simmons*, No. 92-3375, 1993 U.S. App. LEXIS 18359 (5th Cir. July 20, 1993); *Cooke v. Manufactured Homes, Inc.*, No. 93-1005, 1993 U.S. App. LEXIS 17167 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edward & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), petition for cert. filed, June 25, 1993. Insofar as these courts have specifically addressed § 27A(b) rather than placing a blanket imprimatur on § 27A in its entirety, these opinions generally reflect the view that in enacting subsection (b), Congress simply acted within its powers to "change the underlying law" and apply the change retrospectively. We strongly disagree with the rationale behind these decisions, but we will refrain from critiquing each of them point by point; we believe our reasoning speaks for itself. Of course, we are also well aware of the multitude of District Court opinions on the subject.

Hayburn's Case. The dangers to judicial independence in a system of separate powers remain; we are no more willing to ratify a legislative usurpation of the judicial power today than the Court was in 1792.[12]

The shareholders cite several cases they believe illustrate exceptions to this longstanding rule. They argue, in

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[12] See also *McCullough v. Commonwealth of Virginia*, 172 U.S. 102 (1898), in which the Court reviewed a Virginia statute which effectively nullified bonds issued by the Commonwealth. State and Federal courts had previously adjudged the bonds to be fully negotiable. The Court held, among other things, that

> it is not within the power of a legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough, 172 U.S. at 123-24. The Government asserts that *McCullough*, which the District Court cited in holding § 27A(b) to be unconstitutional, was the only occasion where the Supreme Court held a statute unconstitutional under the "vested rights doctrine." Even if this be the case, we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court, or on us. We do not base our decision primarily on this so-called "vested rights doctrine," despite its prominent separation of powers component, because the asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant, a central rationale of the vested rights doctrine. However, we note that McCullough remains good law, including the holding quoted above, even if the Supreme Court has not ruled on a similar case since. *See Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988); *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974).

essence, that because Congress has the power in certain circumstances to affect the application or effect of judicial actions, this power necessarily extends to all judgments, including the final judgments of the Federal courts.[13] Intervening on behalf of the shareholders, the United States argues that in fact no such rule has survived at all. However, we believe the rule to be not only alive but vital to the continuing integrity of the independent Federal judiciary; further, we believe no true exceptions to the rule exist. Not only is each case cited by shareholders and the Government distinguishable, but the Supreme Court has taken great pains to reinforce the final judgment rule in every instance where it has been invoked.

The Government completely mischaracterizes the cases it cites in support of its argument that "the Supreme Court has explicitly upheld a wide range of federal and

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[13] As proof that no judgments are truly "final," shareholders and the Government point to Fed. R. Civ. P. 60(b), which allows a court the discretion to "relieve a party . . . from [a] final judgment" it has previously rendered, on motion from a party, where any or all of a number of factors, such as mistake, fraud, or new evidence, show that the original judgment was somehow tainted or unfair. This argument completely misses the crucial point that Rule 60(b) in no way threatens judicial autonomy or implicates the separation of powers. The question is not whether the courts may disturb final judgments, but whether Congress may disturb them. *See Treiber v. Katz*, 796 F. Supp. 1054, 1062 n.7 (E.D. Mich. 1992) ("The Court's authority to set aside its own final judgment . . . is profoundly different from a legislative decree requiring courts to set aside final judgments."). To put this irresponsible argument in proper perspective, surely the Government would not argue that just because the Supreme Court can nullify legislation by declaring it to be violative of the Constitution, so can the President.

state statutes that have divested litigants of final judgments." For example, the Government cites *Pennsylvania v. Wheeling and Belmont Bridge Co. (the Wheeling Bridge Case)*, 59 U.S. (18 How.) 421 (1856), which involved a bridge that defendants had built at the behest of the Commonwealth of Virginia spanning the Ohio River. In an earlier action, Pennsylvania had succeeded in getting the Supreme Court to declare the bridge an "obstruction of the free navigation of the . . . river" which harmed commerce in Pennsylvania; the Court granted injunctive relief requiring that the bridge be torn down or rebuilt with sufficient height to permit riverboat traffic. *Id.* at 429. The Court also awarded costs to the plaintiff. *Id.* In response, an act of Congress was passed declaring the bridge to be a "lawful structure," declaring the bridge and the roads it connected to be a Federal post road, and requiring riverboat operators not to interfere with the construction or operation of the bridge. *Id.* Pennsylvania nonetheless moved the Court to enjoin the rebuilding of the bridge (which a storm had since destroyed), arguing both that the new act of Congress was inconsistent with the free navigation of the river which Congress had guaranteed by previous enactment, *id.* at 430, and that the new act of Congress could not have the effect and operation of annulling the prior judgment of the Court, *id.* at 431.

Congress has the power "to regulate the navigation of the river," the Court noted; it similarly has the power "to regulate commerce among the several States." *Wheeling Bridge*, 59 U.S. at 430, 431. Since Congress ultimately controls both these powers, its retroactive legalization of the bridge "modifies" its previous enactments ensuring

free navigation; "although it still may be an obstruction in fact, [it] is not so in contemplation of law." *Id.* at 430. Thus, Pennsylvania's injunctive relief, which entitled it to demand that the builders alter or destroy the bridge as necessary to preserve Congress's mandate that there be unhindered navigation of the Ohio River, had no force once Congress had redefined the river's navigability to include the presence of the bridge.

Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief. However, the *Wheeling Bridge* Case does not, as the Government would have us believe, therefore hold that Congress may act to deprive all parties of final judgments rendered in their favor. The *Wheeling Bridge* Court not only recognized but stressed this distinction, and took the opportunity to restate, in the strongest terms, the general rule against legislative modification of settled judgments:

> But it is urged that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially, as it respects adjudication upon the private rights of parties. When they have passed into judgment, the right becomes absolute, and it is the duty of the court to enforce it . . .
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> * * *

> . . . [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court.

Wheeling Bridge, 59 U.S. at 431.

In other words, had Pennsylvania claimed that it had lost, say, a million dollars in tax revenues as a result of the obstruction, and had the Court affirmed a judgment against the bridge company in that amount prior to the Congress's taking any further action, Congress could not permissibly enact a bill which vacated, reversed, or otherwise disturbed that money judgment. Indeed, the Court noted that the costs it had granted Pennsylvania "stood upon the same principles" and were not affected by the subsequent legislation. *Id.* The "judgment of the court" results from the court's exercise of judicial power to apply the law in existence at the time of judgment to the facts presented, and to reassign property rights as necessary to satisfy the law. Disputed property rights, such as claims for damages, thus become settled, and are entitled to the judiciary's protection and enforcement.

The continuing vitality of the rule against disturbing final judgments notwithstanding, shareholders and the Government nonetheless attempt in the alternative to distinguish the present case, arguing that a judgment rendered in favor of defendants on the basis of a time bar does not have the same finality as a judgment rendered "on the merits." We do not question the traditional legislative power to amend, repeal, or even extend statutory

time limits. Where Congress changes or supersedes such time limits, no litigant can properly assert a continuing or vested "right" to the old time limit. See *United States v. The Schoonoer Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). However, we reject the Government's argument, based on Congress's power to amend statutes of limitation, that "[a] judgment resting on a statute of limitations is no more 'fundamental,' and no more immune from legislative revision, than the statute of limitations itself." Perhaps vaguely aware of the enormous consequences which would result to our system of government were the Congress's undisputed power to change the existing laws extended to allow it retroactively to change the prior application of those laws by the courts, the Government attempts to limit its argument to "technical, non-substantive" laws such as statutes of limitation and repose.

To repeat, we fail to identify a single case (besides the ones holding § 27A to be constitutional) which has held that the decision of a Federal court adjudging a claim to be time-barred is not a final judgment. Again, the cases cited by appellant and the Government hold only that statutes of limitation are "arbitrary enactments by the law-making power," "good only by legislative grace" and may be changed by Congress and applied retroactively to pending cases. *Campbell*, 115 U.S. at 628; *Chase Securities*, 325 U.S. at 314. In *Chase Securities*, for example, the Court noted that the Minnesota courts (whence the appeal arose) had not finally determined whether the plaintiff's case was time-barred, thus the case was

> not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor.

Chase Securities, 325 U.S. at 310. While the *Chase Securities* decision's description of the legislature's power to change statutes of limitations retroactively is indeed sweeping, this language conclusively shows both that the Court believed dismissals of time-barred claims to be "final judgments" and that the Court did not view this legislative power as extending to require that courts substitute a new limitation period in cases finally decided under a previously applicable one. *See also Campbell*, 115 U.S. at 628 ("[S]tatutes, shortening the [limitation] period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete.") (emphasis added).

Thus, there is no principled basis on which to defend either the Government's proposed rule or, for that matter, its proposed limitation. Congress may change an established time bar, even with the effect of reviving claims that would otherwise remain "dead" due to the lapse of time. But where the courts have adjudged a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment and apply the subsequent change in place of the time bar that originally resolved the case, even by giving the new provision retroactive effect. Where a Federal court enters judgment in a case on the basis of a time bar, it confers upon the prevailing party a right based on the protections that the time bar provides. Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties

created thereby constitute the essence of the judicial power.

IV.

In only one context has the Supreme Court ratified acts of Congress which specifically required the courts to reconsider issues which had been previously adjudicated and upon which the courts had rendered a final judgment. The shareholders and the Government argue that these cases instruct our present situation; we read them as applying very narrowly, and as standing on a distinct and specifically enumerated constitutional power of Congress. Where the United States has been party to a lawsuit, and the court has rendered judgment in favor of the United States, the Supreme Court has recognized Congress's power to authorize relitigation of the same issues, and have the courts apply such new law as Congress passes retroactively to the same case. While such legislation erases the effects of judgments of the Federal courts, it does not trespass upon the power of the judiciary; the Court has viewed such an act as tantamount to a waiver of liability by the Government, and has ratified such an act as a permissible exercise of Congress's explicit Article I power to pay the debts of the United States.

The shareholders and the Government cite the recent Supreme Court decision in *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407 (1992), and its decision in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), to show that the Constitution does not prohibit Congress from reopening final judgments of the Federal courts. In *Seattle Audubon*, the Court approved an act of Congress which had amended laws

specifying what areas of the Northwest national forests, eco-realm of the elusive northern spotted owl, could be logged. As part of this provision, Congress "determin[ed] and direct[ed]" that the new specifications apply to two cases which the statute noted by name. *Seattle Audubon*, 112 S. Ct. at 1411-12, nn. 1-3. In *Sioux Nation*, Congress acted to permit the plaintiff Indians, who had been pressing their claims in court for nearly a century, and who had lost appeals before the Supreme Court twice before, to relitigate before the Court of Claims; the statute directed the Court of Claims to review the case anew without regard to the prior judgments that the claims court and the Supreme Court had previously rendered in favor of the Government. *Sioux Nation*, 448 U.S. at 389. The Supreme Court upheld that statute as well.

Neither case stands in opposition to the Court's long-standing rule against Congressional interference with the settled judgments of the Federal courts. In neither instance did Congress compel the Federal courts to vacate, revise, or reconsider final judgments rendered in cases between private parties. The cases Congress named specifically in the statute considered in *Seattle Audubon* were pending cases, not decided cases. Indeed, the petitioners challenged the statute on the grounds that Congress had infringed on the judiciary power by prescribing the rule of decision in those cases in contravention of the *Klein* doctrine,[14] not that Congress had

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[14] *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) established the rule that Congress cannot "prescribe a rule for the decision of a cause in a particular way." *Klein*, 80 U.S. at 146. After the Civil War, citizens of the former Confederacy could petition the Court of Claims under a 1863 law for a return of property, or proceeds therefrom, confiscated by Federal troops.

interfered with settled judgments. *Seattle Audubon*, 112 S. Ct. at 1414-15.

Sioux Nation answered directly the objection that Congress could not "disturb[] the finality of a judicial decree" under the longstanding rule set out in *Hayburn's Case*. *Sioux Nation*, 448 U.S. at 391-92. The Court disposed of the objection by framing the issue in terms of Congress's recognized power "to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Id.* at 396-97 (citing *United States v. Cherokee Nation*, 202 U.S. 101 (1906)). In approving this action, the Court in no way cast doubt on the continuing vitality of the rule in *Hayburn's Case*. The Court noted that it had in previous cases "affirmed the broad constitutional power of Congress to define and 'to pay the Debts . . . of the United States.'" *Id.* at 397

The petitioners had to prove that they had not fought in the war, and had to prove their loyalty to the Union. Lincoln had issued a general pardon to any Southerner who swore loyalty to the Union. The Supreme Court held that a pardon served as sufficient proof of loyalty and noncombatant status. *United States v. Padelford*, 76 U.S. 531 (1869). In response to *Padelford*, Congress passed a new law which directed the Court of Claims to hold all such pardons inadmissible on behalf of the claimants for the purposes of these petitions; the possession of such a pardon would instead be deemed proof of disloyalty. *Klein* held the new law unconstitutional as a legislative subversion of the judicial function. While the *Klein* doctrine similarly protects the judiciary power from legislative encroachment, we believe § 27A(b) forces the courts to rule again on cases they have dismissed with prejudice, not that it forces the courts to rule on those cases (or any cases) in a particular way. But see *Henderson v. Scientific-Atlanta*, 971 F.2d 1567, 1576 (Wellford, J., dissenting) (Section 27A violates *Klein* doctrine).

(quoting U.S. Const., Art. I, § 8, cl. 1). Where Congress acts to allow litigants to reassert failed claims against the Government, it does

> not interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before.

Nock v. United States, 2 Ct. Cl. 451, 457-58 (1867) (approving a joint resolution of Congress authorizing the Court of Claims to reconsider a claim against the United States previously decided in favor of the Government, and to decide the claim "in accordance with the principles of equity and justice") (quoted in *Sioux Nation*, 448 U.S. at 398). Since waiving the defense of res judicata does not "reverse[] a decree of [a] court," *Sioux Nation*, 448 U.S. at 398 (quoting *Nock*, 2 Ct. Cl. at 457-58), statutes in which Congress imposes upon itself "a legal, in recognition of a moral, obligation to pay" claims against it do not "encroach upon the judicial function which . . . had previously [been] exercised in adjudicating that the obligation was not legal" and are therefore permissible. *Id.* at 401 (quoting *Pope v. United States*, 323 U.S. 1, 9-10 (1944)). We do not see this recognition of a constitutionally enumerated power of Congress as creating an exception to the longstanding rule against disturbing judgments rendered in favor of private parties, much less as a rejection of that rule, as the Government suggests. Indeed, the *Sioux Nation* case allows Congress the power only to ratchet the Government's liability to claimants in favor of private parties; Congress may not disturb final judgments

rendered against the United States, since to allow this power would be to permit Congress to act as a judge in its own case to decide a dispute in its favor. *Id.* at 404-05 (citing *Klein*).

Needless to say, the very existence of this appeal suggests that defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' case with prejudice as time barred. Appellants here simply fail to draw a defensible constitutional parallel between judgments rendered in favor of the United States and judgments rendered in favor of private parties.

V.

We strongly object to the idea put forth by the Government that the judgment rendered in favor of the defendants by the District Court was not truly "final" because of the speed with which Congress acted to undo that judgment. Some final judgments are less final than others only to the extent that some pregnant women are less pregnant than others. The vesting of rights in parties to judgments does not depend upon the consent of Congress, tacit or explicit. And a subsequent act of Congress purporting to divest those rights violates the Constitution regardless of the haste with which the vote is taken and the act signed into law.

The shareholders and the Government argue that Congress could properly remedy the "windfall" that *Lampf* bestowed upon the defendants here and in similar actions. True, the litigants had proceeded under the assumption that the Kentucky Blue Sky law would apply,

but the Supreme Court read the Federal securities laws differently.[15] Once the Court had determined the rights of the parties in *Lampf*, those parties' rights were fixed; similarly, once the District Court applied *Lampf* to dismiss with prejudice the present litigation, and that decision was not appealed, the rights of these parties were fixed, and the shareholders' claims forever precluded. Without a doubt, certain members, and presumably a majority, of Congress believed these results to be unfair, and, as the Government argues, a "windfall" for the respective defendants.[16] However, Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power.

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[15] And, we note, correctly, according to Congress. In enacting § 27A, Congress did not "change the underlying law" by repealing, amending or replacing the one year/three year time bar the *Lampf* Court derived from the securities laws, but eliminated only the applicability of that time bar, both to the claims asserted in *Lampf* itself and to all cases dismissed by the retroactive application of *Lampf*. This act of Congress does nothing more than command the courts to ignore (for a while) a valid judgment of the Supreme Court, adding salt to an already grievous wound.

[16] See, for example, the comments of Senator Bryan in support of § 27A:

> The Supreme Court's decision in *Lampf*, June 20, 1991, in effect frees Michael Milken and scores of other felons and defendants of responsibility to pay back the people they have swindled. It would be a monstrous injustice that the icons of greed in effect escape responsibility by reason of a Supreme Court decision that is given retroactive application. All we seek is to give the victims a fair day in court.

137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991).

VI.

Our system of Federal government vests in the Congress the legislative power, and in the Article III courts the judicial power. The Constitution makes this allocation of powers explicit, and there is nothing equivocal in its language. It is true that some recent decisions of the Supreme Court have evidenced a willingness to find that the separation of powers so "essential to the preservation of liberty," *Mistretta v. United States*, 488 U.S. 361, 380 (1989), is not offended so long as the actions of one branch do not involve an attempt to increase the powers of that branch at the expense of the powers of another branch, or usurp or impermissibly undermine the powers properly belonging to another branch. See generally *Mistretta*, 488 U.S. 361; *Morrison v. Olson*, 487 U.S. 654 (1988).

However, we believe that even if this trend by the Supreme Court may be said to vindicate the "a little separation is enough" view of this essential doctrine, the case at bar clearly represents the irreducible minimum of the separation required to preserve the system's last vestiges of federalism. For if Congress may by legislation reverse or vacate the final judgments of the Federal courts, then Congress has rendered the whole function of the judiciary futile: whether "the whole power of one department is exercised by the same hands which possess the whole power of another department," *Mistretta*, 488 U.S. at 381 (quoting The Federalist No. 47 (Madison)) is left subject only to the self-restraint of the legislature. As Jefferson wrote,

> Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. . . . The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.

Thomas Jefferson, Notes on the State of Virginia, Query 13, 121 (1784) (reprinted in Ralph Lerner and Philip B. Kurland, eds., 1 The Founders' Constitution 320 (1987)). Were the validity of the judgments of the judicial branch to depend on the approval of the legislative branch, how much more fully could the legislature increase its own powers at the expense of the judiciary, or usurp or undermine the powers properly belonging to the judicial branch? What part of the camel would then remain outside the tent?

Where Congress disagrees with the manner in which the judiciary has interpreted a statute, it may amend that statute so as to effect the proper congressional intent, and thus render the faulty judicial interpretation moot. But Congress may not require the Federal courts to nullify or vacate their properly rendered judgments, regardless of what injustice Congress believes those judgments have visited upon private parties. As the judges writing to George Washington in *Hayburn's Case* sagely reflected,

> [I]t is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles, of humanity and justice,

> which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

2 U.S. at 409-10 n.2 (1792). Since § 27A(b) unambiguously requires courts to do so, we hold that subsection to be an unconstitutional usurpation of the judiciary power. We accordingly AFFIRM the judgment of the District Court denying the shareholders' motion to reinstate their lawsuit.

DAMON J. KEITH, Circuit Judge, concurring in part and dissenting in part.

The crux of the majority's argument is that section 27A(b) violates the constitutional principle of separation of powers by asking courts to reverse final judgments. The majority essentially argues that section 27A(b) allows an impermissible reopening of adjudicated cases. Although I agree that section 27A(b) cannot be constitutionally applied to the plaintiffs in the instant case, I write separately because I do not believe that section 27A(b) violates separation of powers principles in all contexts. To the contrary, section 27A(b) is an example of Congress permissibly overriding a judicial interpretation of a statute, without violating principles of separation of powers.

The issue of finality is only relevant in this case because the plaintiffs did not appeal the district court's

initial dismissal of their claim. If the plaintiffs had appealed that ruling, the judgment could not be considered "final" under any analysis, but instead "pending" until it had completed its way through the appellate process. In *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993), the Ninth Circuit held that section 27A(b) did not violate principles of finality for cases which had been appealed. The court stated that:

> These cases are properly construed as "pending" cases for separation of powers purposes. See *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987) (judgment is "final" and case is no longer pending only after "the availability of appeal [is] exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari finally [has been] denied"); see also *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 813 (11th Cir. 1988) ("When it so intends, [Congress'] ability to affect the content of a non-final judgment in a civil case, through retroactive legislation ceases only when a case's journey through the courts comes to an end."), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L.Ed.2d 988 (1989); *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir.) ("The suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still sub judice.") (internal quotations omitted)), *cert. denied*, 409 U.S. 949, 93 S. Ct. 270, 34 L.Ed.2d 220 (1972).

Id. at 1571.

The Seventh Circuit reached the same conclusion in *Berning v. A.G. Edward & Sons, Inc.*, 990 F.2d 272 (7th Cir.

1993). The court reasoned that, because the case was pending on appeal at the time that section 27A was passed, there was no final judgment to be upset. The Court stated that:

> The principle that Congress may impose new legal rules applicable in pending cases was recognized by the Supreme Court almost two hundred years ago in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). Because Congress is free to make changes in the law applicable to pending civil cases, "the legislature may change a statute of limitations at the last instant, extending or abrogating the remedy for an established wrong." *Tonya K. ex rel. Diane K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir.1988).

Id. at 277.

In the case at hand, Congress was unable to protect these litigants under section 27A(b), because by the time 27A(b) was enacted, the time period for filing an appeal had passed. Nevertheless, for those litigants who did appeal the district court's initial dismissal of their claim, section 27A(b) does not disturb final judgments, and is therefore consistent with separation of powers requirements.

Courts are under a duty to impose a saving interpretation of an otherwise unconstitutional statute so long as it is "fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Seattle Audubon Soc'y v. Robertson*, 112 S. Ct. 1407 (1992); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988). Accordingly, I would AFFIRM the judgment of the district court

on the grounds that section 27A(b) cannot be constitutionally applied to the litigants in the instant case, but I would not find section 27A(b) unconstitutional as applied to litigants who appealed the initial dismissal of their claims.

No. 93-313

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In The

Supreme Court of the United States

October Term, 1993

BDO SEIDMAN, BRACEWELL & PATTERSON, J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, AND WILLIAM M. TEMPLETON,

Petitioners,

v.

GAYLON D. SIMMONS, GLORIA ANNETTE TURNER SIMMONS, GREENWICH INSURANCE COMPANY, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF THE CASE

Petitioners' Statement of the Case, while generally adequate, fails to include two key facts relevant to the Court's decision to deny or grant the petition. *First*, the district court dismissed Respondents' claims under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), *without prejudice*. *See* Appendix at A2. The judgment of the district court thus lacked res judicata effect, as the district court specifically recognized. *See* Appendix at A13. *Second*, Petitioners did not appeal the district court's decision to dismiss Respondents' claim without prejudice.

REASONS FOR DENYING THE WRIT

1. The Decision of the Fifth Circuit is Correct.

Section 27A of the 1934 Act is presumptively constitutional. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). The United States Court of Appeals for the Fifth Circuit has tested the presumption in the case of Section 27A and, after detailed analysis, has concluded that Section 27A is consistent with the limitations on legislative and judicial powers set forth in Articles I and III of the Constitution. Seven other Circuit Courts of Appeals have also concluded that Section 27A is constitutional.[1] In the

[1] *Cooke v. Manufactured Homes, Inc.*, No. 93-1005, 1993 U.S. App. LEXIS 17167 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A. G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993);

face of both the presumption of constitutionality and the weight of appellate authority, the decision of the Sixth Circuit in *Plaut v. Spendthrift Farms, Inc.*, 1993 U.S. App. LEXIS 19738 (6th Cir. August 3, 1993), stands out as an anomaly. The Court should decline to exercise its discretionary jurisdiction in *this* case, and resolve the conflict created by the Sixth Circuit in a review of *Plaut*, if that case ultimately exits the Sixth Circuit in its present form.

The opinions of the Fifth and Sixth Circuits can be readily compared and conflicts between the two easily identified. The existence of the conflict, rather than the merits of the constitutional issues over which the conflict arises is relevant to the Court's decision to exercise its jurisdiction. Nevertheless, differences in the rationales of the two circuit courts highlight the fundamental correctness of the Fifth Circuit's decision.

The Fifth Circuit supported its decision with a rationale that is consistent with contemporary due process analysis. The opinion of the Sixth Circuit rests largely on subsequently modified authority and a suspect theory of "vested rights." For many years, this Court has properly questioned the practical and theoretical utility of a "vested rights" analysis. As early as 1885, the Court observed that, while the term has some readily accepted meaning in the context of real property rights, "when we get beyond this, although vested rights may exist they are better described by some more exact term, as the phrase

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Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir.), *reh'g granted in part*, 977 F.2d 1549 (1992), *cert. denied*, 113 S. Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, June 25, 1993.

itself is not one found in the language of the Constitution." *Campbell v. Holt*, 115 U.S. 620, 628 (1887). Consistent with the Court's view expressed in *Campbell*, the Fifth Circuit has observed that the vested rights analysis begs the question of due process by "merely stat[ing] due process conclusions." *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, 997 F.2d 39, 47 (5th Cir. 1993).[2] Ultimately, the issues now raised before the Court are issues of due process and should be decided "according to the jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation." *Id.*

The Petitioners here, and the current Sixth Circuit opinion in *Plaut*, ultimately rely on the authority of *McCollough v. Virginia*, 172 U.S. 102 (1898). As the Fifth Circuit has correctly concluded, the absolutist holding of *McCollough v. Virginia* has been substantially modified in *Fleming v. Rhodes*, 331 U.S. 100 (1947), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In the proceedings below, Petitioners failed to distinguish *Fleming* and *Usery*, both of which upheld the right of Congress to deprive litigants of rights acquired by judgment and retroactively to create liability for past acts. The Fifth Circuit properly adhered to the guidance of this Court's more recent holdings, which authority superseded *McCollough*. The Sixth Circuit, however, did not consider, much less distinguish,

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[2] *TGX Corp. v. Simmons*, No. 92-3375 (5th Cir. 1992), was consolidated for hearing with *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, and the Fifth Circuit issued a single opinion for both cases reported under the style and caption of *Pacific Mutual*.

the intervening precedent of *Fleming* and *Usery*. Thus, it is the decision of the Sixth Circuit that is in conflict with established precedent of this Court. If any decision needs reviewing, it is the holding of the Sixth Circuit.

Petitioners also claim that Section 27A impermissibly creates liability for past acts and is thus inconsistent with this Court's holdings in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), and *William Danzer & Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925). Petitioners' argument lacks merit for two reasons. First, the holding in *Usery* that Congress may retroactively create liability for past acts raises a serious question as to the utility of *Danzer* in this analysis. *See Usery*, 428 U.S. at 16. Second, the holding of *Lampf* adopts the standards of Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e) as governing the limitations periods for actions under Section 10(b). As the Fifth Circuit has correctly observed, Section 9(e) speaks only of limitations on *remedies*; it is silent as to the continued existence of *liability* under the 1934 Act. *See Pacific Mutual*, 997 F.2d at 52.

Finally, the holding of the Fifth Circuit is completely consistent with the Court's recent discussion of Section 27A in *Musick, Peeler & Garrett v. Employers Ins.*, 113 S. Ct. 2085 (1993). In *Musick*, the Court was asked to decide whether an implied right of contribution was available among co-defendants in a private action under Section 10(b). As support for its conclusion that a right of contribution was available, Justice Kennedy, writing for the Court, discussed at some length the curious tension and division of labor between the Court and Congress in the

"cumulative work" of shaping the parameters and defining the content of the implied private cause of action under Section 10(b). Justice Kennedy focused particularly on the enactment of Section 27A:

> Following our resolution two Terms ago of a difficult statute of limitations issue for 10b-5 suits, Congress intervened by limiting the retroactive effect of our decision, and the caution in its intervention is instructive. In an approach parallel to the one it adopted for the insider trading statute, Congress did no more than direct the applicable "limitation period for any private civil action implied under [Section 10(b)] that was commenced on or before June 19, 1991."

Id. at 2089 (quoting Section 27A) (citations omitted).

The Court's discussion of Section 27A and its reliance on such congressional intervention as instructive within the separate spheres of judicial and congressional action, strongly suggests that the Court is content with Section 27A and that further review of the statute is not warranted.

2. Review of the Fifth Circuit's Decision is Premature.

The Sixth Circuit issued its opinion in *Plaut* on August 3, 1993. The United States of America, an intervenor in *Plaut*, has requested and received additional time within which to file a suggestion for rehearing *en banc*. On September 3, 1993, the Sixth Circuit requested briefs from the parties on the merits of the suggestion for rehearing. *See* Appendix at A23. As of this writing, the briefs have not been filed; thus, the ultimate outcome of

Plaut is far from clear. Until the Sixth Circuit has made its decision final, it is premature to maintain that a conflict exists between the Fifth and Sixth Circuits.[3]

3. Even if the Decision of the Sixth Circuit is Upheld, the Result in This Case Will Remain Unchanged.

The scope of the Sixth Circuit's opinion in *Plaut* reaches only those cases in which a final, unappealed judgment has been entered. *See* Respondents' Appendix at A61. Since *Plaut* involved an unappealed judgment of dismissal with prejudice, the issue of finality centered on whether a judgment based upon the passing of a statutory limitations period was "final" for all purposes. The Sixth Circuit concluded that such judgments are final. However, as the dissent in *Plaut* observed, there are instances, such as those created by appealed judgments, that must necessarily fall outside the reach of the Court's ruling and within the statutory reach of Congress. *See* Petitioners' Appendix at A87.

Respondents' Section 10(b) claim, unlike that of the shareholders in *Plaut*, was dismissed *without prejudice*. As this Court has observed in the context of Rule 41(a) of the

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[3] The Court has pending before it a petition for a writ of certiorari filed in the case of *Henderson v. Scientific-Atlanta, Inc.*, 967 F.2d 1567 (11th Cir.); *pet. for cert. filed* June 25, 1993. Although the issues presented in *Henderson* are not framed identically to the issues considered herein, the underlying issue of separation of powers was addressed by the Eleventh Circuit, 986 F.2d at 1571-75. Review of the petition in *Henderson* will afford the Court an opportunity to consider the constitutional dimensions of Section 27A and rule upon them in that case.

Federal Rules of Civil Procedure, "a [d]ismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits . . . , and thus does not have res judicata effect." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). Since Respondents' claim was dismissed without prejudice, it could be refiled at the trial court level without penalty and not subject to a defense of res judicata. Accordingly, the dismissal was simply not an adjudication on the merits capable of creating in Petitioners a "right" to be free from relitigation of Respondents' claim. On the contrary, by defining the dismissal as without prejudice, the district court clearly signalled the Petitioners that their fight was not over and that refiling was not foreclosed by the dismissal.

In *Plaut*, however, the argument can be made that dismissal *with* prejudice did give rise to the defense of res judicata, which, absent Section 27A, immunized the *Plaut* defendants from relitigation of the claims against them. This crucial distinction between this case and *Plaut* raises the issue whether the holding in *Plaut*, even if upheld by this Court, would require reversal of the judgment of the Fifth Circuit in this case. Respondents submit that the distinction is dispositive. Petitioners claim that, like the defendants in *Plaut*, they cannot be deprived of the rights conferred upon them by a final judgment. However, unlike the defendants in *Plaut*, Petitioners never acquired the right they claim to have lost – the right to be free from relitigation of the Section 10(b) claim brought against them.

The conclusion drawn by the Sixth Circuit in its discussion of *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), highlights the dispositive nature of the

relationship between principles of res judicata and dismissal without prejudice. In *Sioux Nation*, Congress retroactively waived the defense of res judicata previously interposed by the United States to bar relitigation of claims brought by Native Americans. *Id.* at 389. The Sixth Circuit cited *Sioux Nation* for the proposition that the case does not "creat[e] an exception to the longstanding rule against disturbing judgments rendered in favor of private parties," but merely "allows Congress the power only to ratchet the Government's liability to claimants in favor of private parties. . . . " *See* Petitioners' Appendix at A82. In concluding that *Sioux Nation* supported, rather than prohibited, striking down Section 27A, the Sixth Circuit specifically noted that "the very existence of this appeal suggests that defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' case *with prejudice* as time barred." *Id.* at A83 (emphasis added).

The Sixth Circuit's reference to the dismissal below as having been with prejudice can hardly be gratuitous, particularly in the context of a discussion of res judicata. Implicit in the Sixth Circuit's conclusion is the realization, expressed by this Court in *Cooter & Gell*, that absent a dismissal with prejudice, there would be no res judicata defense available for the defendants to have waived. Thus, even under the holding of *Plaut*, reinstatement of Respondents' claim in this case would not offend due process and the doctrine of separation of powers in the manner condemned by the Sixth Circuit.

Unlike the Sixth Circuit, the Fifth Circuit had before it a non-constitutional basis to reverse the judgment of the district court in *TGX Corp. v. Simmons*. Respondents

argued below that because the dismissal without prejudice lacked res judicata effect, the judgment created in Petitioners no "right," vested or otherwise, of which Section 27A(b) could divest them. Therefore, Petitioners had failed to overcome the threshold of any alleged deprivation of due process. Although the Fifth Circuit had available to it a valid non-constitutional basis for decision in *TGX Corp. v. Simmons*, the same basis was unavailable in *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, which involved a final judgment of dismissal with prejudice. Since the Fifth Circuit was required to reach to full-blown due process and separation of powers issues in *Pacific Mutual*, and since, given the court's decision, the result in both cases would be the same, the Fifth Circuit chose not to rule on the non-constitutional basis of decision in *TGX*.

The Fifth Circuit's election, however, does not foreclose the issue. If the petition is granted, this Court will necessarily consider the procedural, non-constitutional grounds for upholding the decision of the Fifth Circuit before reaching the constitutional issues presented. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). *See also The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (petition for certiorari dismissed after oral argument when it became apparent that the case could be decided as a matter of contractual law rather than by reference to a federal statute). In that event, Respondents submit that the Court will conclude, in reliance on *Cooter & Gell*, that the procedural argument raised, but not ruled on below, is sufficient to dispose of this case.

The procedural grounds for affirming the Fifth's Circuit are unique to this case. On the other hand, the constitutional issues, *if* a conflict about them survives

rehearing in the Sixth Circuit, are squarely presented in both *Plaut* and *Pacific Mutual*. Thus, either of those cases will be better suited for review.

4. The Conflict Created by the Decision of the Sixth Circuit is Limited in Duration and Scope.

The terms of Section 27A restrict the statute's application to the limited number of cases that were (1) brought under Section 10(b) of the 1934 Act, (2) pending on June 19, 1991, and (3) dismissed as time barred as a result of *Lampf*. The sub-set of cases falling within Section 27A(b) affected by the conflict between the Fifth and Sixth Circuits is further limited to Section 27A cases dismissed in a final judgment and reinstated within a sixty day safe harbor. Simple logic compels the conclusion that the entire universe of cases hanging on this "important question of federal law," Petitioners' Brief at 14, can contain no more than a handful of lawsuits.

Section 27A is a statute that has expired under its own terms. This fact ensures that the issues presented for review arising *under this statute* will not recur. The brief duration of the statute, combined with the meager number of remaining cases renders review of Section 27A by the Court inappropriate. *See United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 392 (1952), and the discussion in R. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-67 (1953).

CONCLUSION

The decision of the Fifth Circuit below is correct and consistent with the opinions of this Court. The opinion of the Sixth Circuit, which created the conflict upon which the petition is based, is anomalous and inconsistent with contemporary due process analysis. Therefore, if the Court determines that the conflict of opinion merits review, the Court is urged to review and reverse the holding of the Sixth Circuit. Moreover, review is premature until the judgment of the Sixth Circuit becomes final. Finally, the Court should decline to exercise its discretionary jurisdiction in this case because narrower, non-constitutional grounds exist for upholding the result reached by the Fifth Circuit in a manner consistent with the holding of the Sixth Circuit.

Respectfully submitted,

Dated: September 24, 1993

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TGX CORPORATION	*	CIVIL ACTION
VERSUS	*	NO. 87-5298
GAYLON D. SIMMONS AND GLORIA ANNETTE TURNER SIMMONS	*	SECTION "M"
	*	MAGISTRATE DIV. 2

CONSOLIDATED WITH

GAYLON D. SIMMONS and GLORIA ANNETTE TURNER SIMMONS	*	CIVIL ACTION
	*	NO. 90-0849
VERSUS	*	SECTION "M"
J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY and WILLIAM M. TEMPLETON	*	MAGISTRATE DIV. 2
	*	(Filed Aug. 5, 1991)

JUDGMENT AND ORDER

The several Motions to Dismiss for Failure to State a Claim or Alternatively for Summary Judgment of Defendants in *Simmons, et ux. v. Templeton, et al.*, came on for hearing on Wednesday, July 24, 1991. Considering the motions, memoranda, affidavits, and materials on file, and the arguments of counsel; upon finding that no issue of material fact exists, all of the federal claims asserted are time-barred, and the Defendants are entitled to judgment on those claims as a matter of law; and upon finding that there is no just reason for delay and that final judgment should be entered herein,

IT IS ORDERED, ADJUDGED AND DECREED that all of plaintiffs' claims against J. C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W.A. Griffin, Thomas L. Kister, Leonard Leon, Edward T. Cotham, William M. Templeton, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Company, Harbor Insurance Company, and Continental Insurance Company, asserted under Section 12 of the Securities Act of 1933, and the Securities Exchange Act of 1934 are hereby dismissed ~~with prejudice.~~ [P.A.B.].

New Orleans, Louisiana, this 5th day of August, 1991.

/s/ Peter A. Beer
UNITED STATES
DISTRICT JUDGE

MINUTE ENTRY
BEER, J.
SEPTEMBER 27, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TGX CORP.	CIVIL ACTION
VERSUS	NO. 87-5298
GAYLON D. SIMMONS AND GLORIA ANNETTE TURNER SIMMONS	SECTION M

CONSOLIDATED WITH

GAYLON D. SIMMONS AND GLORIA ANNETTE TURNER SIMMONS	CIVIL ACTION NO. 90-0849 SECTION M
VERSUS	(Filed Sept. 27, 1991)
J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY and WILLIAM M. TEMPLETON	

The following motions in the above-styled action were heard on September 18, 1991: (1) Defendant BDO

Seidman's Motion for Summary Judgment on Plaintiffs' Negligent Misrepresentation Claim; (2) Defendant BDO Seidman's Motion to Dismiss or, alternatively, for Summary Judgment on Plaintiffs' Fifth Amended Counterclaim; (3) TGX Corporation's Motion for Review of Magistrate's Ruling on Plaintiffs-in-Counterclaim's Motion for Leave to File Fifth Amended Counterclaim; (4) Defendant BDO Seidman's Motion for Review of Magistrate's Order granting plaintiffs leave to file a fifth amended counterclaim; (5) Defendants' (individual TGX directors and Bracewell & Patterson) Objection to Magistrate's Ruling or, alternatively, Motion to Dismiss, and (6) Defendant Greenwich Insurance Company's Objection to Magistrate's Ruling or, alternatively, Motion to Dismiss.

The court holds that motion (1) is denied. Motions (2)-(6) are granted insofar as the federal claims contained in plaintiffs' fifth amended counterclaim are dismissed as time-barred, and the state claims are dismissed based on this court's discretionary refusal to exercise pendent jurisdiction. The state claims are dismissed without prejudice, leaving plaintiffs to pursue those claims in state court.

BACKGROUND

In November 1986, the Simmons sold their full interest in LEDCO, Inc., to TGX Corp. (TGX) for approximately $21,000,000. Plaintiffs received $11,000,000 in cash; 300,000 shares of preferred TGX stock, valued at approximately $3,000,000; real property; forgiveness of a $1,000,000 debt owed by plaintiffs to LEDCO; and,

deferred consideration of $5,000,000 plus interest, to be paid in annual installments.

Plaintiffs contend that, because the TGX stock has proven worthless and none of the deferred payments has been made, they have received only $13,000,000 instead of the expected $21,000,000. Plaintiffs claim their $8,000,000 in damages was caused by their reliance on TGX's financial statements in agreeing to the LEDCO sale. Plaintiffs contend the statements did not disclose the existence of a lawsuit pending against TGX, which caused the devaluation of TGX stock and rendered TGX unable to honor its deferred payment obligations. TGX was eventually forced into bankruptcy.

TGX sued the Simmons in 1987, and the Simmons counterclaimed alleging violations of the Securities Act of 1933 ("1933 Act"), the Securities Exchange Act of 1934 ("1934 Act") and the Louisiana Blue Sky law. The suit was automatically stayed when TGX filed for bankruptcy under Chapter 11 in February 1990. On March 3, 1990, the Simmons filed suit against TGX's individual directors, and its law (Bracewell & Patterson) and accounting (BDO Seidman) firms, alleging negligent misrepresentation and violations of Section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law. The 1987 and 1990 suits have been consolidated, and the matter is set for trial in March 1992.

I. DEFENDANT BDO SEIDMAN'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIM

Defendant, as TGX's accounting firm, prepared the financial statements on which plaintiffs allegedly relied in agreeing to the LEDCO sale. Plaintiffs claim defendant is guilty of negligent misrepresentation because TGX's financial statements did not accurately reflect TGX's troubled financial status prior to the LEDCO deal. Defendant seeks summary judgment, claiming it had no duty to plaintiffs under Louisiana's negligent misrepresentation law and therefore cannot be held liable for their losses.

Defendant's motion for summary judgment is hereby denied. As accountant for a publicly-traded corporation, defendant had a duty to all potential investors, including plaintiffs, to provide accurate financial information on which they could base investment decisions. Material questions remain as to whether defendant discharged its duty. Such questions preclude the entry of summary judgment on defendant's behalf.

The law of summary judgment is well-settled. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When the moving party has carried its burden under Rule 56(c), the burden shifts and the non-moving party can defeat a summary judgment motion only by "set[ting] forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Because Louisiana law

applies in this case, it determines what facts are "material" to plaintiffs' action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The parties agree that Louisiana has adopted Restatement 2d of Torts section 552, entitled "Information Negligently Supplied for the Guidance of Others," for evaluating negligent misrepresentation claims. The parties cite different subsections of section 552, however, to support their respective contentions. Defendant relies on subsections (2)(a) and (2)(b), which state that the liability of one who negligently misinforms another is limited to the loss suffered

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552(2) (1977). Plaintiffs, by contrast, rely on subsection (3), which states that

> The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, and any of the transactions in which it is intended to protect them.

Id. at § 552(3). Whether subsection (2) or subsection (3) applies thus hinges on whether defendant was under a public duty to provide accurate information in TGX's financial reports.

The court finds that defendant had a public duty to provide accurate information concerning TGX's financial health. This duty has been created by both statute and common law. A legal duty may be created by statute. *French Mkt. Plaza Corp. v. Sequoia Ins. Co.*, 480 F.Supp. 821, 824-25 (E.D.La. 1979). The federal securities laws obligate public accountants to provide fair and accurate information concerning a public corporation's financial status. *See, e.g.*, 15 U.S.C.A. §§ 78m(a), 78r(a) (1981). Thus, defendant had a statutory duty to the investing public to provide accurate financial information regarding TGX.

The Supreme Court has similarly imposed a duty on accountants to provide the public with accurate information. In *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the Internal Revenue Service sought to investigate corporate tax returns which had been reviewed and verified by respondent public accounting firm. Respondent corporation ordered the accounting firm to withhold requested tax accrual papers, claiming they were privileged. The Court held that the summons compelling production of said documents was enforceable, rejecting a claim that the tax accrual papers were analogous to the attorney work product found unreachable in *Hickman v. Taylor*, 329 U.S. 495 (1947). *Id.* at 817. The Court stated that the *Hickman* doctrine was based on the attorney's role as a private, confidential advisor, while

> [a]n independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client.

Id. at 817 (emphasis in original). Similar to its statutory duty, defendant thus also had a common law duty to provide accurate information to the investing public.[1]

Because defendant was under a public duty, Restatement 2d section 552(3) applies, and the question becomes whether plaintiffs were members of the class of persons for whose benefit the duty has been created. As potential investors in a publicly-traded corporation, plaintiffs appear to be the exact persons for whom the public duty was created. The federal disclosure requirements were enacted to benefit investors by promoting fairness in

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[1] Defendant cites *First National Bank of Commerce v. Monco*, 911 F.2d 1053 (5th Cir. 1990), in claiming it had no duty to plaintiffs, and that summary judgment on plaintiffs' claim is therefore proper. The *Monco* court, applying Louisiana law, affirmed a summary judgment in favor of an accounting firm on whose financial report a bank had relied in making a defaulted loan to the firm's client. The court stated that summary judgment was proper because "Louisiana law does not protect every reasonably foreseeable consumer of inaccurate auditing information." *Id.* at 1055.

Monco can be distinguished from the current proceedings. Unlike BDO Seidman, the accounting firm in *Monco* believed its audit report would be distributed only to a small, ascertainable group of third parties. There is no indication the client in *Monco* was a publicly-traded company subject to federal disclosure requirements. The accounting firm in *Monco* reasonably believed its report would go only to select recipients, and it was only to those recipients that the firm owed a duty of accuracy. Accordingly, the firm was not liable when the report was relied upon by a bank not in the foreseeable class of recipients. By contrast, defendant BDO Seidman was aware that potential investors in TGX would rely on its report. As such, its duty extended beyond the limited duty imposed on the accounting firm in *Monco*.

corporation-investor transactions. *See Fisher v. Kletz*, 266 F.Supp. 180, 184 (S.D.N.Y. 1967) (section 13(a) of the 1934 Act, 18 U.S.C.A. § 78m(a) (1981), requires a public accountant to "report fairly on the facts as he finds them whether favorable or unfavorable to his client. His duty is to safeguard the public interest, not that of his client."). Investors such as plaintiffs thus are within the class of persons for whose benefit defendant's duty to provide accurate information was created.

Defendant thus had a public duty to provide plaintiffs with accurate information concerning TGX's financial status. Material questions bearing on the discharge of that duty remain contested, and summary judgment is therefore improper. Plaintiffs claim that a brief statement in defendant's 1986 SEC filings[2] did not satisfy federal disclosure requirements. Whether the filings represented a fair and accurate disclosure of TGX's status so as to discharge defendant's public duty constitutes a material question of fact sufficient to deny defendant's motion for summary judgment.[3]

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[2] In 1986 SEC filings, the only reference to pending litigation in was that, "From time to time, in the normal course of business, the Company is a party to various matters of litigation. Management is of the opinion that the eventual outcome of these matters will not have a material adverse effect on the Company."

[3] An additional reason for denying defendant's motion is that plaintiffs have not completed their discovery. Federal Rule of Civil Procedure 56(f) states that a court may refuse an application for summary judgment in order to "permit affidavits to be obtained or depositions to be taken or discovery to be had. . . ." Fed. R. Civ. P. 56(f). The Fifth Circuit has recently held that summary judgment motions should more readily be denied

Defendant's motion for summary judgment is hereby denied.

II. MOTIONS OBJECTING TO MAGISTRATE'S RULING OR, ALTERNATIVELY, SEEKING DISMISSAL OF PLAINTIFFS' FIFTH AMENDED COUNTERCLAIM

On August 22, 1991, Magistrate Wynne granted plaintiffs leave to file a fifth amended counterclaim in the 1987 suit. Leave was granted pursuant to Federal Rule of Civil Procedure 15(a), which states that second and subsequent leaves to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Magistrate Wynne granted plaintiffs' motion on a procedural basis only, and expressly left it to this court to determine whether substantive law bars plaintiffs' claims. The remaining motions heard on September 18 all challenge Magistrate Wynne's ruling or, alternatively, seek dismissal of the claims contained in plaintiffs' fifth amended counterclaim.[4]

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where the nonmovant has not completed its discovery. *See International Shortstop, Inc. v. Rally's, Inc.*, No. Civ. 90-8563, slip op. at 5737-39 (5th Cir. Aug. 29, 1991).

[4] Plaintiffs' fifth amended counterclaim contained the following allegations:

(1) J.C. Templeton, President and Chairman of the Board of TGX, was charged with (a) violating section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (b) conspiracy to defraud; and, (c) controlling person liability for TGX Corp.'s alleged violations of the 1933 and 1934 Acts;

(2) TGX Corp. was charged with (a) violating section 12(2)

A. Federal Securities Claims

Magistrate Wynne did not address defendants' contentions that the federal claims in plaintiffs' fifth amended counterclaim are barred by res judicata or, alternatively, that they are time-barred under the Supreme

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of the 1933 Act; (b) violating section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (c) breach of contract; (d) fraud; and, (e) misrepresentation;

(3) BDO Seidman, TGX's accounting firm, was charged with (a) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; and, (b) negligent misrepresentation;

(4) Bracewell & Patterson, TGX's outside counsel, was charged with (a) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (b) conspiracy to defraud; and, (c) vicarious liability for the acts of its agent, Joe Foy;

(5) Joe Foy, a partner at Bracewell & Patterson and a director of TGX, was charged with (a) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (b) conspiracy to defraud; and, (c) controlling person liability for TGX Corp.'s alleged violations of the 1933 and 1934 Acts;

(6) Individual director defendants Carlson, Enloe, Griffin, Kister, Leon, W. Templeton, and Cotham were charged with (a) conspiracy to defraud; (b) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; and, (c) controlling person liability for TGX Corp.'s alleged violations of the 1933 and 1934 Acts;

(7) Individual director defendants J.C. Templeton, Foy, Carlson, Enloe, Griffin, Kister, Leon, W. Templeton and Cotham were charged with (a) tortious interference with contract; (b) breach of fiduciary duty; (c) negligent mismanagement; (d) fraud; and, (e) negligent misrepresentation; and

(8) Greenwich Insurance Co., liability insurer of director defendants, was charged with solidary liability and wrong refusal to pay or settle a claim.

Court's recent decision in *Lampf v. Gilbertson*, 1991 U.S. LEXIS 3629 (June 20, 1991). This court now holds that plaintiffs' federal claims are not barred by res judicata, but are time-barred because the claims cannot relate back to the date of plaintiffs' original filing in the 1987 suit. The federal claims contained in plaintiffs' fifth amended counterclaim are therefore dismissed as untimely.

Res Judicata: The federal claims in plaintiffs' fifth amended counterclaim are not barred by res judicata. The federal claims were dismissed from the 1990 suit without prejudice. Such a dismissal is not on the merits, and therefore does not trigger res judicata.

In August 1991, plaintiffs' federal securities claims in the 1990 lawsuit were dismissed without prejudice by this court. *See* Judgment and Order of August 5, 1991. The Supreme Court has recently stated that a " '[d]ismissal without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits,' and thus does not have a res judicata effect." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2456 (1990) (quoting Fed.R.Civ.P. 41(a)(1)). The Fifth Circuit has similarly stated that res judicata attaches only to dismissals on the merits. *See Steven D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045-46 (5th Cir. 1989).

Defendants cite *Thompson Trucking* and *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (en banc), to support their contention that the federal securities claims in plaintiffs' fifth amended counterclaim are barred by res judicata. Both precedents are distinguishable from the current proceedings.

Thompson Trucking held a limitations-based dismissal to be on the merits and therefore capable of triggering res judicata. *Thompson Trucking*, 870 F.2d at 1046. Defendants argue that, because the dismissal of plaintiffs' federal securities claims from the 1990 suit was limitations-based, the dismissal was on the merits and res judicata applies. Defendants ignore, however, the crucial distinction between *Thompson Trucking* and plaintiffs' claims. The claim in *Thompson Trucking* was dismissed with prejudice, while plaintiffs' claims in the 1990 suit were dismissed without prejudice. Consistent with *Cooter & Gell*, *Thompson Trucking* merely held that a dismissal with prejudice constitutes a final judgment on the merits for res judicata purposes. *Thompson Trucking* does not address the res judicata effects of a dismissal without prejudice.

Defendants' reliance on *Nilsen* is similarly misplaced. Plaintiff in *Nilsen* filed four consecutive suits alleging Title VII violations by her employer. In *Nilsen I*, plaintiff's claim was dismissed without prejudice, and thus did not bar the filing of *Nilsen II* and *III*. Plaintiff then filed *Nilsen IV*, which the Fifth Circuit dismissed on res judicata grounds based on the dismissals of *Nilsen II* and *III*. Both *Nilsen I* and the Simmons' federal claims in the 1990 suit were thus dismissed without prejudice, and just as the dismissal of *Nilsen I* did not bar the filing of *Nilsen II-III*, the dismissal of the Simmons' federal claims from the 1990 suit does not bar the filing of their fifth amended counterclaim.

The federal securities claims in plaintiffs' fifth amended counterclaim are not barred by res judicata.

Time-Bar and Relation Back: While the federal securities claims in plaintiffs' fifth amended counterclaim are not barred by res judicata, they are time-barred because the claims cannot relate back to plaintiffs' original filing in the 1987 suit.

In *Lampf v. Gilbertson*, 1991 U.S. LEXIS 3629 (June 20, 1991), the Supreme Court held that litigation under section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, had to be commenced within one year of the discovery of an alleged violation and within three years of such alleged violation. The three-year period was defined as a "period of repose," granting potential defendants a substantive right to be free from liability arising out of a challenged transaction after the period had run. The parties have already agreed that *Lampf* applies retroactively to bar plaintiffs' federal securities claims in the 1990 suit. The parties disagree, however, on whether the claims are similarly barred in the 1987 suit.

The relevant transaction between plaintiffs and TGX closed on November 14, 1986. Plaintiffs state they first discovered the alleged violations of section 10(b) and Rule 10b-5 in March 1989. They filed an amended counterclaim alleging fraud on April 25, 1989, within the time limits set by *Lampf*. Whether the federal claims in plaintiffs' fifth amended counterclaim are now time-barred hinges on whether said claims can relate back to the date of plaintiffs' original filing.

Defendants claim that, since the three-year period set in *Lampf* is a period of repose, it cannot be circumvented by relation back under Federal Rule of Civil Procedure

15. They cite *Resolution Trust Corp. v. Olsen*, 1991 U.S. Dist. LEXIS 10337 (D. Ariz. May 31, 1991), in which the court stated that "relation-back under Rule 15 does not apply when the statute at issue defines substantive rights rather than merely limiting procedural remedies." Plaintiffs claim that, regardless of whether the limitations period is a statute of limitations (procedural) or a period of repose (substantive), relation back is proper as long as defendants had notice during the limitations period that they may be subject to liability, and the relation back would not cause defendants undue prejudice.

Plaintiffs' federal claims should not be barred merely because the three-year limitation stated in *Lampf* is a period of repose. Rule 15(c) speaks only of the "period provided by law for commencing the action," Fed.R.Civ.P. 15(c), and thus does not distinguish between periods of repose and statutes of limitations. Moreover, courts have permitted relation back under section 12(2) of the Securities Act of 1933, despite a period of repose similar to that set in *Lampf* for section 10(b) and Rule 10b-5. *See, e.g., Kilmartin v. H.C. Wainwright & Co.*, 637 F.Supp. 938, 943 (D. Mass. 1986) (amended complaint relates back, despite expiration of section 12(2)'s period of repose, because notice and prejudice requirements of Rule 15(c) are satisfied); *Brener v. Becker Paribas, Inc.*, 628 F.Supp. 442, 453 (S.D.N.Y. 1985) (amendment adding section 12(2) claim after expiration of period of repose relates back because defendant cannot prove undue prejudice or delay of trial). *Kilmartin* and *Brener* hold that a period of repose is not a per se bar to relation back. There is no basis for holding that the period of repose set in *Lampf* should have a more preclusive effect than the period set for

section 12(2). Whether plaintiffs' claims are time-barred, therefore, hinges solely on whether the requirements of Rule 15(c) have been satisfied.

This court now holds that plaintiffs' claims are time-barred because plaintiffs cannot satisfy the requirements for relation back. Based on Rule 15(c), the Supreme Court has established four factors which plaintiffs must prove for their fifth amended counterclaim to relate back to their original filing:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone v. Fortune, 477 U.S. 21, 29 (1986). All four factors must be satisfied before relation back will apply. *Id.*; *Bell v. Veterans Admin. Hosp.*, 826 F.2d 357, 360 (5th Cir. 1987).

Plaintiffs arguably can satisfy the first and second *Schiavone* requirements, but they cannot satisfy the third and fourth requirements. Plaintiffs' federal securities claims therefore cannot relate back to plaintiffs' original filing in the 1987 suit, and the claims are untimely under *Lampf*.

Rule 15(c) was intended to ameliorate the harsh consequences that would otherwise result where a confusing bureaucratic structure caused a plaintiff to name the wrong government agency or the wrong member of a

corporate conglomerate as defendant. *See* Fed.R.Civ.P. 15(c) advisory committee's note to 1966 Amendment. Rule 15(c) was not designed to afford plaintiffs a second chance where they omit defendants from earlier claims based not on mistaken identity, but rather on a tactical decision believed at the time to be in plaintiffs' best interests. The Simmons knew the identities of all defendants at the filing of their 1989 counterclaim, as such information was contained in the financial documents which plaintiffs reviewed prior to entering the LEDCO sale. Plaintiffs chose to name only the corporate defendant, however, because they feared Rule 11 sanctions if their securities claims later proved to be unfounded. " 'Relation back' will not apply where, as here, the plaintiff is aware of a potential defendant, but is simply unsure about that party's potential liability." *Milandra Milling Corp. v. Ogilvie Mills, Inc.*, 746 F.Supp. 40, 42-43 (D. Kan. 1990) (footnote omitted).

The federal securities claims in plaintiffs' fifth amended counterclaim cannot relate back to the filing of plaintiffs' 1989 counterclaim. These claims are therefore time-barred by the three-year periods of repose for section 12(2) of the 1933 Act, section 10(b) of the 1934 Act, and Rule 10b-5 promulgated thereunder. The federal securities claims in plaintiffs' fifth amended counterclaim are hereby dismissed.

B. State Law Claims

Plaintiffs' fifth amended counterclaim also contains two sets of state law claims. One set, pled in Count Six of plaintiffs' original complaint, alleges breach of fiduciary

duty and tortious interference with contract. The second set contains fraud claims and a claim under Louisiana's Blue Sky law. La. Rev. Stat. Ann. § 51:701-724 (West 1987 & Supp. 1991). The court now hereby declines to exercise its pendent jurisdiction[5] and dismisses both sets of state law claims without prejudice, leaving plaintiffs to pursue those claims in state court.

Plaintiffs' state law claims would be subject to this court's jurisdiction if federal question jurisdiction were present and the state claims were subject to pendent jurisdiction. To establish pendent jurisdiction, plaintiffs must prove that their "state and federal claims . . . derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Count Six claims: In their original counterclaim, plaintiffs alleged, inter alia, breach of fiduciary duty and tortious interference with contract. Because the events supporting these claims occurred after the November 1986 transaction on which plaintiffs' federal claims were based, the state claims were never subject to this court's pendent jurisdiction.[6] These state claims are hereby

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[5] The court notes that there is no diversity jurisdiction over plaintiffs' state claims because there is not complete diversity among the parties. Plaintiffs and defendant William Templeton are domiciled in Louisiana.

[6] *See Texwood, Ltd. v. Gerber*, 621 F.Supp. 585 (S.D.N.Y. 1985). In *Texwood*, plaintiff joined state claims with a federal 10b-5 claim. The court dismissed a state claim alleging post-sale breach of fiduciary duty, because the facts supporting the state claim arose after the sale which formed the basis of the federal claim. *Id.* at 590. Similar to the dismissed state claim in *Texwood*, plaintiffs' Count Six claims arise from post-transaction facts

dismissed without prejudice, leaving plaintiffs to pursue these claims in state court.

Fraud and Louisiana Blue Sky claims: Plaintiffs' federal claims have herein been dismissed. "When a . . . narrowing of the issues excludes all federal claims, whether a pendent state claim should be remanded to state court is a question of judicial discretion. . . . " *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) (citations omitted), *cert. denied sub nom. Sheet Metal Workers' Int'l Ass'n v. Carter*, 450 U.S. 949 (1981). The court hereby exercises its discretion and dismisses these state claims without prejudice, leaving plaintiffs to pursue these claims in state court.

The Supreme Court has indicated that dismissal of plaintiffs' fraud and Blue Sky claims is proper. In *United Mine Workers v. Gibbs*, the Court stated that,

> if the federal claims are dismissed before trial . . . the state claims should be dismissed as well. (footnote omitted) Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Gibbs, 383 U.S. at 726-27. Both examples in *Gibbs* support the dismissal of plaintiffs' fraud and Blue Sky claims. Plaintiffs' federal claims are being dismissed pretrial; and, once plaintiffs' federal claims are dismissed, state issues not only will "predominate," but will be the sole

---

distinct from the pre-transaction facts supporting their federal claims. *Texwood* demonstrates that the Count Six claims are not subject to the court's pendent jurisdiction, and should be dismissed.

issues in the case. *Gibbs* states that such circumstances warrant the dismissal of plaintiffs' otherwise-pendent state claims. Plaintiffs' fraud and Blue Sky claims are therefore dismissed without prejudice, leaving plaintiffs to pursue these claims in state court.

In summary, plaintiffs' federal securities claims in the fifth amended counterclaim are not barred by either res judicata or the existence of a period of repose. The federal claims are time-barred, however, because the claims cannot relate back to plaintiffs' original filing. The federal claims are therefore dismissed.

All state claims in plaintiffs' fifth amended counterclaim are also dismissed. The claims contained in Count Six of plaintiffs' original complaint do not arise from the same nucleus of operative facts as the federal claims, and thus are not subject to the court's pendent jurisdiction. The fraud and Louisiana Blue Sky claims are dismissed in the court's discretion. The dismissal of all state law claims is without prejudice, leaving plaintiffs to pursue these claims in state court.

CONCLUSION

Defendant BDO Seidman's motion for summary judgment on plaintiffs' negligent misrepresentation claim is DENIED. All remaining motions are GRANTED insofar as they seek dismissal of the federal and state claims contained in plaintiffs' fifth amended counterclaim to the 1987 suit.

Defendants are requested jointly to submit a judgment consistent with this minute entry.

/s/ Peter Beer
Peter Beer
United States
District Judge

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 48202-3985

LEONARD GREEN
CLERK

TELEPHONE
ILLEGIBLE
ILLEGIBLE

September 3, 1993

Mr. Glenn C. Van Bever
Mr. L. Clifford Craig

Re: Case No. 92-5591
Plaut, et al. v. Spendthrift Farm, Inc., et al.

Dear Counsel:

This is to advise that the court directs you to file a response to the appellants' and intervenor's petition for rehearing en banc in the above case. Your response should not exceed ten pages. You should file twenty-five (25) copies of the response and it is to be received in the clerk's office no later than the close of business on Friday, September 17, 1993. Please note that no extensions will be granted.

Very truly yours,

/s/ Leonard Green/pc
Leonard Green
Clerk

pc

cc: Mr. J. Montjoy Trimble
Mr. Mark B. Stern
Mr. Douglas N. Letter

No. 93-313 and 93-611

NOV 29 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

BDO SEIDMAN, ET AL., PETITIONERS

v.

GAYLON D. SIMMONS, ET AL.

CONTINENTAL INSURANCE COMPANY, PETITIONER

v.

GAYLON D. SIMMONS, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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17 pp

QUESTIONS PRESENTED

1. Whether Section 27A(b) of the Securities Exchange Act of 1934 (Exchange Act), which provides for the reinstatement of certain private actions under Section 10(b) of the Exchange Act that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the separation of powers doctrine or the Due Process Clause of the Fifth Amendment as applied to a suit dismissed without prejudice.

2. Whether the Due Process Clause prohibits Congress from retroactively extending the three-year time limit for commencing a private Section 10(b) action under *Lampf*.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-313

BDO SEIDMAN, ET AL., PETITIONERS

v.

GAYLON D. SIMMONS, ET AL.

No. 93-611

CONTINENTAL INSURANCE COMPANY, PETITIONER

v.

GAYLON D. SIMMONS, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A38,[1] is reported at 997 F.2d 39. The opinion of the district court denying the motion for reinstatement,

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[1] Except as otherwise noted, references to "Pet. App." are to the appendix to the petition in No. 93-313.

Pet. App. A39-A54, is reported at 786 F. Supp. 587; the court's opinion denying the motion for reconsideration, Pet. App. A55-A58, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993. A petition for rehearing was denied on August 25, 1993. 93-611 Pet. App. 34a-35a. The petition for a writ of certiorari in No. 93-313 was filed on August 26, 1993. The petition for a writ of certiorari in No. 93-611 was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1990, respondents Gaylon D. Simmons and Gloria Annette Turner Simmons filed a securities fraud action against petitioners in the United States District Court for the Eastern District of Louisiana. The complaint stated claims arising under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent state law claims. Pet. App. A5-A6, A40.

At the time the suit was filed, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Fifth Circuit, like a number of other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *Jensen* v. *Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) (borrowing Louisiana statute of limitations in Rule 10b-5 action).

On June 20, 1991, while this action was pending before the district court, the Court rendered its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), holding that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under that provision, a suit is untimely if brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. On the same day that this Court decided *Lampf*, it also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disallowed the use in civil litigation of a judicial rule of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

Shortly thereafter, petitioners moved to dismiss this case, contending that the suit was untimely under the federal limitations period adopted in *Lampf* and made retroactive by *Beam*.[2] In August 1991, the district court granted petitioners' motion and dismissed the federal claims. In order to allow the Simmonses to pursue an amendment of their complaint in a related suit, however, the court made the dismissal without prejudice. Pet. App. A7 & n.5, A40-

[2] This Court applied its holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting). As a result, under *Beam*, the new limitations period adopted in *Lampf* became applicable to all other pending private Rule 10b-5 actions.

A41.[3] Two months later, the district court ordered the dismissal of the Simmonses' pendent state law claims. *Id.* at A41. The Simmonses did not appeal from those orders.

2. In December 1991, four months after the dismissal of the federal securities claims in this case, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. III 1991), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A applies to private Rule 10b-5 actions that were commenced before June 20, 1991, the date that *Lampf* was decided. Subsection (a) of Section 27A provides that the limitations periods for such pre-*Lampf* suits shall be the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. Subsection (b) of Section 27A provides for the reinstatement of pre-*Lampf* suits that were dismissed as time-barred under *Lampf* but were timely under the jurisdiction's pre-*Lampf* rules. Subsection (b) required motions for reinstatement to be filed within 60 days of the enactment of Section 27A. 15 U.S.C. 78aa-1(a) and (b) (Supp. III 1991).

In January 1992, within the 60-day period prescribed by subsection (b), the Simmonses moved to reinstate their federal securities claims. Pet. App. A7. The district court denied the reinstatement motion, *id.* at A39-A54, as well as a subsequent motion

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[3] The defendants submitted a draft order that provided that the dismissal was "with prejudice." Pet. App. A7. Before entering the order, the district court struck out the quoted words at the Simmonses' request, in order "to avoid any preclusive effect" of the judgment. *Ibid*; see *id.* at A41.

that subsection (b) violates the Due Process Clause of the Fifth Amendment and the separation of powers doctrine by reopening final judgments of federal courts. Pet. App. A56-A58.[4]

3. The Simmonses appealed. The court of appeals consolidated that appeal with the appeal from another district court decision that had held Section 27A(b) unconstitutional,[5] and the United States intervened in both appeals, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Section 27A.[6] Pet. App. A8.

The court of appeals reversed, rejecting all constitutional challenges to Section 27A(b). Pet. App. A13-A38. The court held that neither the Due Process Clause nor the separation of powers doctrine prohibits Congress from creating a statutory mechanism for reinstating previously timely suits that were dismissed as untimely under *Lampf*. Pet. App. A14-A28, A35-A38. The court also held that the

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[4] The district court also held that Section 27A is unconstitutional in its entirety under *Beam*, *supra*, because it prevents federal courts from applying *Lampf* retroactively to other pending cases. Pet. App. A49-A53. The court of appeals rejected that holding, *id.* at A33-A34, and petitioners do not raise the issue in this Court.

[5] *Pacific Mutual Life Insurance Co.* v. *First Republicbank Corp.*, No. 92-1662 (5th Cir.), petition for cert. pending *sub nom. First Republicbank Corp.* v. *Pacific Mutual Life Insurance Co.*, No. 93-609 (filed Oct. 18, 1993).

[6] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

Due Process Clause does not prohibit Congress from retroactively extending the limitations periods established in *Lampf*. Pet. App. A29-A33.

ARGUMENT

1. Petitioners challenge the holding of the court of appeals that Section 27A(b) of the Exchange Act is constitutional. 93-313 Pet. 6-15; 93-611 Pet. 7-12. In our view, the court of appeals correctly rejected petitioners' constitutional claims and upheld Section 27A(b). The Fifth Circuit's decision, however, conflicts with *Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993), rehearing denied (Oct. 14, 1993), in which the Sixth Circuit held that Section 27A(b) violates the separation of powers doctrine.[7]

Because the Fifth and Sixth Circuits have rendered conflicting decisions on the issue in this case, and because the Sixth Circuit's decision in *Plaut* invalidates an Act of Congress, the constitutionality of subsection (b) of Section 27A should be resolved by this Court.[8] See pages 8-9, *infra*. The present

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[7] We note that the constitutionality of subsection (b) of Section 27A is currently before the Tenth Circuit in *Johnston* v. *CIGNA Corp.*, No. 92-1186 (argued Sept. 27, 1993). The Second Circuit rejected a constitutional challenge to subsection (b) in *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (Sept. 27, 1993), but it rested its decision on narrow grounds (the absence of a final judgment in the case) and did not decide the constitutionality of the provision as a general matter.

[8] In contrast, there is no circuit conflict over the constitutionality of subsection *(a)* of Section 27A. Seven courts of appeals have held subsection (a) to be constitutional; none has held otherwise; and this Court has twice denied certiorari petitions seeking review of that issue. See *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied,

petitions, however, are not appropriate vehicles for this Court to reach the underlying constitutional issues.

As noted above, when the district court dismissed the federal securities claims brought against petitioners, the court made the dismissal "without prejudice." Pet. App. A7. The court did so at the Simmonses' request, in order "to avoid any preclusive effect." *Ibid.* While a dismissal with prejudice bars future relitigation of the dismissed claim in accordance with conventional res judicata principles, a dismissal without prejudice "does not have a res judicata effect," *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990), and permits the plaintiff to renew the litigation. See, *e.g.*, 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2373, at 230-231 (1971). By entering a dismissal without prejudice of the Simmonses' claims, the district court left the Simmonses free to renew their securities claims without being barred by the original dismissal.

The fact that the dismissal order allowed the Simmonses to renew their Rule 10b-5 action is fatal to petitioners' constitutional objections; indeed, the

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113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir.), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. Sept. 27, 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).

dismissal "without prejudice" makes it possible to affirm the judgment permitting reinstatement on a quite narrow basis.

Petitioners make two basic arguments regarding Section 27A(b): first, that the Due Process Clause prohibits Congress from divesting litigants of rights that have been "vested" by final judgments; and second, that the separation of powers doctrine prevents Congress from compelling courts to reopen concluded litigation. Both of those arguments presuppose that the judgment at issue is genuinely final, in the sense of conclusively settling the legal dispute between the parties. But there is no such judgment here. Petitioners cannot claim that subsection (b) deprived them of "vested rights," because a dismissal without prejudice is not a judgment that confers any rights, vested or otherwise, to be free from further litigation on the dismissed claims. Nor can petitioners contend that subsection (b) improperly forces the courts to reopen concluded litigation in violation of the separation of powers doctrine, because the district court's order left the Simmonses entirely free to refile their securities claims. In sum, because petitioners did not receive a final district court judgment dismissing the complaint against them with prejudice, this Court could affirm the judgment of the court of appeals without having to reach the merits of the constitutional issue that has divided the circuits.

While the present petitions are thus an inappropriate vehicle for review, in the companion case that the Fifth Circuit decided in the same opinion that disposed of petitioners' case (see note 5, *supra*), the constitutional claims are squarely presented. See *First Republicbank Corp.* v. *Pacific Mutual Life*

Insurance Co., No. 93-609. In *First Republicbank*, the district court held Section 27A(b) to be unconstitutional for substantially the same reasons that were given by the district court in this case. *First Republicbank*, however, differs from this case in that, when the district court dismissed the federal securities claims there as untimely under *Lampf*, it entered a judgment of dismissal with prejudice. The petition in *First Republicbank* thus cleanly presents the question on which the circuits are split, and we have suggested that the Court grant the petition in that case.[9] Accordingly, the present petitions should be held pending disposition of *First Republicbank*, and then disposed of as is appropriate in light of that case.

2. Petitioners in No. 93-313 raise a separate claim that is not presented by the petition in *First Republicbank* and was not presented to the Sixth Circuit in *Plaut*. They assert (Pet. 14) that one of the two time limits recognized in *Lampf*, the three-year time limit running from the occurrence of the violation, may not be retroactively extended by Congress. According to petitioners, once the three-year period passes, potential defendants acquire a constitutional immunity from liability that Congress may not disturb.

Unlike petitioners' other arguments, which depend on the existence of a final judgment in their favor, this argument turns solely on the running of the time limit. As a result, it calls into question not only subsection (b), but Section 27A in its entirety. The court of appeals correctly rejected that argument (Pet. App. A34-A35), and its holding does not conflict

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[9] We have provided petitioners in this case with a copy of our brief in *First Republicbank*.

with any decision of this Court or any other court. Further review of that issue is not warranted.

This Court has repudiated the notion that the Constitution prohibits a legislature from extending a statute of limitations after the limitations period has run. In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), this Court rejected a due process challenge to a Minnesota statute that retroactively extended the limitations period for pending state securities law claims. The Court held that the statute could be applied to revive a pending claim that otherwise would have been time-barred. The Court held that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after [the] right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." 325 U.S. at 311-312 (citing *Campbell* v. *Holt*, 115 U.S. 620 (1885)). Accord *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976).

Relying on *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), petitioners seek (93-313 Pet. 14) to draw a constitutional distinction between "statutes of limitation," which may be lengthened retroactively, and "statutes of repose," which assertedly may not. In *Danzer*, the Court held that the Due Process Clause prohibited Congress from extending a two-year period for making certain private claims under the Interstate Commerce Act after the period had run. 268 U.S. at 636-637. The Court distinguished between limitations periods that "apply to the remedy only," leaving the underlying liability

intact, and limitations periods that "constitute a part of the definition of a cause of action * * * and operate as a limitation upon liability." *Id.* at 637. As to the latter class of limitations periods, the Court reasoned that the passage of the period made it "as if liability had never existed," and the Court held that applying a subsequently enacted statute "retroactively to create liability" would violate the Due Process Clause. *Id.* at 636, 637.

Petitioners' reliance on *Danzer* is mistaken for at least two independent reasons. First, as the court of appeals noted (Pet. App. A30), *Danzer* rests on a view of legislative retroactivity that this Court itself has long since repudiated. *Danzer* depends on the premise that the Due Process Clause prohibits Congress from legislating "retroactively to create liability." 268 U.S. at 637. But this Court has subsequently rejected that premise. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *United States* v. *Sperry Corp.*, 493 U.S. 52, 57-58, 64-65 (1989); see *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2287 (1993). Under these precedents, "legislation readjusting rights and burdens is not unlawful [under the Constitution] solely because it upsets otherwise settled expectations * * * *even though the effect of the legislation is to impose a new duty or liability based on past acts.*" *Usery*, 428 U.S. at 16 (emphasis added). Whatever may have been the state of due process jurisprudence when *Danzer* was decided in 1925, the subsequent decisions in *Usery* and *Pension Benefit Guaranty Corp.* make clear that the Due Process Clause does

not prohibit Congress from "impos[ing] a new duty or liability based on past acts."

Second, petitioners have failed to show that the three-year time limit recognized in *Lampf* "constitute[s] a part of the definition of [the] cause of action * * * and operate[s] as a limitation upon liability" (*Danzer*, 268 U.S. at 637). Petitioners appear to believe that a statute of repose, by its very nature, affects the right rather than the remedy. But this Court has rejected that proposition. See, *e.g.*, *City of El Paso* v. *Simmons*, 379 U.S. 497, 506 n.9 (1965) (holding statute of repose to be "an alteration of remedy rather than obligation"). Here, as the court of appeals pointed out, the statutory provision that creates the three-year time limit (Section 9(e) of the Exchange Act) "bars an action to enforce a liability, and says nothing about the continued existence of that liability." Pet. App. A31. Thus, the three-year period would not come within the scope of *Danzer* even if *Danzer* remained good law. Cf. *Chase*, 325 U.S. at 312 n.8 (distinguishing *Danzer*).

CONCLUSION

The petitions for writs of certiorari should be held pending the disposition of *First Republicbank Corp.* v. *Pacific Mutual Life Insurance Co.*, No. 93-609, and disposed of consistently with that case.

Respectfully submitted.

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NOVEMBER 1993

No. 93-313

Supreme Court, U.S.
FILED
DEC 14 1993

In The

Supreme Court of the United States

October Term, 1993

BDO SEIDMAN, BRACEWELL AND PATTERSON, J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, and WILLIAM M. TEMPLETON,

Petitioners,

v.

GAYLON D. SIMMONS, GLORIA ANNETTE TURNER SIMMONS, GREENWICH INSURANCE COMPANY, and THE UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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6. William M. Templeton
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14. Edward T. Cotham
15. United States of America

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[1] TGX Corporation appeared in the style of the court below but was not a party to the proceeding in the United States Court of Appeals for the Fifth Circuit. None of the Petitioners is a corporation, with either a parent company or subsidiaries.

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SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners request that the Court resolve the direct conflicts between the United States Court of Appeals for the Fifth Circuit in the case below and both the United States Court of Appeals for the Sixth Circuit in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993) and this Court's prior decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) and *William Danzer & Co. v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925).

The Brief in Opposition to the Petition for Certiorari filed August 26, 1993, by Gaylon D. Simmons and Gloria Annette Turner Simmons (the "Simmons") is predicated in part upon a then-pending suggestion for re-hearing *en banc* in *Plaut*.[1] Continental Insurance Company filed a separate Petition for Certiorari, No. 93-611, on the same grounds asserted in the instant Petition.[2] Thereafter, the United States (the "government") filed its brief which agrees that the direct conflict between the Fifth Circuit in this case and the Sixth Circuit in *Plaut*, should be resolved by this Court because of the national importance of determining the constitutionality of Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b) (1991). The government suggests, however, that these Petitions do not involve a judgment which is "genuinely final," and that they therefore "are not appropriate vehicles for

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[1] The Sixth Circuit has since denied the application for rehearing *en banc*. No. 92-5591, 1993 WL 495736 (6th Cir. Oct. 14, 1993).

[2] Continental Insurance Company has asked that it be substituted as the real party in interest in place of Greenwich Insurance Company, a named respondent in Petition No. 93-313.

this Court to reach the underlying constitutional issues." *Brief for the United States* at 7.

Petitioners file this Reply for two reasons. First, the government's assertion is apparently predicated upon a misunderstanding of the facts of this case which has resulted in a false distinction between this case and *First RepublicBank Corp. v. Pacific Mutual Life Insurance Co.*, Pet. No. 93-609. This Reply presents procedural facts which bear upon Respondents' argument regarding the "genuine finality" of an unappealed judgment of dismissal without prejudice. Second, a separate constitutional question of equal national import is raised by this Petition, but not by that in *First RepublicBank*; the issues should be considered contemporaneously to avoid piecemeal litigation. As this Reply will demonstrate, this Petition provides the most appropriate vehicle for complete and final review of all the pending constitutional questions.

ADDITIONAL PROCEDURAL HISTORY

The government argues that the dismissal at issue is without prejudice, has no *res judicata* effect, and is therefore not "genuinely final." *Brief for the United States* at 8. The government overlooks key facts to reach this conclusion.

This Petition arises from two consolidated cases ("the 1987 suit" and "the 1990 suit").[3] No Section 10(b) claims

[3] Civil Action Nos. 87-5298 and 90-0849 on the docket of the United States District Court of the Eastern District of Louisiana were consolidated by order of the Honorable Peter H. Beer; the

were asserted in the 1987 suit until July, 1991. By that time, this Court had decided *Lampf* and the date on which a case must have been pending for Section 27A to apply had passed. Thus, the Simmons could only seek reinstatement of the 1990 suit.

After *Lampf*, and in response to Petitioners' Motions for Summary Judgment, the Simmons conceded that their claims in the 1990 suit were eradicated by the rule clarified in *Lampf*. However, before entry of judgment in the 1990 case, the Simmons filed a motion seeking leave to amend their 1987 suit to add to it their Section 10(b) claims. Because more than four years had passed since the transaction, the Simmons sought to invoke the "relation back" doctrine to attain in 1991 a filing date "as of" 1988.

Recognizing that the pending dismissal of the 1990 suit would pose a *res judicata* bar to their proposed amendment, the Simmons requested the trial court to either withhold judgment or dismiss the 1990 suit without prejudice. The trial court granted the Simmons' request by dismissing the 1990 case without prejudice.

The Simmons' second assertion of the same claims ultimately failed. Although they were permitted to amend the 1987 suit, their claims could not relate back to the earlier filing date. Petitioners again filed dispositive motions, which were granted. The Simmons Section 10(b)

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record in the Court of Appeals included the entire record of the consolidated proceedings.

claims were dismissed with prejudice from the 1987 suit.[4] Neither dismissal was ever appealed.

REPLY TO ARGUMENTS RAISED IN BRIEFS IN OPPOSITION

I. CONTRARY TO RESPONDENTS' ASSERTION, THE JUDGMENT THE SIMMONS SEEK TO AVOID IS "GENUINELY FINAL"

Respondents' argument that this Petition is not an appropriate vehicle for this Court to reach the underlying constitutional issues is based on the premise that the dismissal was "without prejudice" and therefore does not have a *res judicata* effect. *Brief for the United States* at 7; *Brief in Opposition* at 6. The government's initial suggestion that "the dismissal without prejudice makes it possible to affirm the judgment permitting reinstatement on a quite narrow basis," *Brief for the United States* at 7-8, is contradicted by its Conclusion which urges that this case be held pending the disposition of *First RepublicBank*. *Brief for the United States* at 13.

Respondents' assertion that the judgment at issue is not "genuinely final," *Brief for the United States* at 8; *Brief in Opposition* at 6-10, is really an effort to provide an excuse for Congress to undermine both the Judiciary's interest in its final judgments and the Fifth Amendment's guarantees that the litigants' vested rights will not be

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[4] The 1987 suit was dismissed with no indication of with or without prejudice. As a matter of law, that dismissal is with prejudice. Fed. R. Civ. P. 41(b).

taken without Due Process and Just Compensation. The first mistake in this position is that any narrow window seemingly opened by a limitations judgment "without prejudice" has nothing whatsoever to do with the separation of powers doctrine. The judiciary's constitutional interest in a final judgment is no different if that judgment is without prejudice. *See* U.S. Const. art. III.

The second fallacy in Respondents' assertion is its predication upon the assumption that "the district court's order left the Simmonses entirely free to refile their securities claims." *Brief for the United States* at 8; See *Brief in Opposition* at 7. While the dismissal "without prejudice" technically left the Simmons free to file the same claims in another suit, it neither prevented the judgment from becoming final and unappealable nor did it alter the effects of the *Lampf* holdings.[5] The Simmons could only overcome the *Lampf* time limit defenses (limitations and repose) by adding their claims to a proceeding filed prior to the expiration of the limitations and repose periods, and having the added claims relate back to the date that proceeding began. They did not appeal their unsuccessful attempt to save their claims in this manner.

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[5] In fact, a dismissal based upon a time bar, by its very nature, prevents the refiling of the same action in any jurisdiction applying the same time bar. *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045-46, *reh'g denied*, 880 F.2d 818 (5th Cir. 1989) and *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983). In light of *Lampf* and *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), there is a uniform time limit applying to these Section 10(b) claims.

The government's argument regarding this judgment is based on a distinction without a meaningful difference. *Lampf* dealt with time limit defenses, not the *res judicata* defense. Section 27A purports to permit reinstatement of certain cases which were dismissed as time barred. Whether *res judicata* is also available to a defendant does not affect the "finality" of such a judgment.

The unappealed dismissal without prejudice forever terminated the 1990 suit. It is that very dismissal the Simmons are attempting to discard by reinstatement. By definition, the dismissal was a final judgment; it was not appealed; and the fact that the District Court and the Fifth Circuit have held the dismissal was based on the time limits announced in *Lampf* (and not on some voluntary basis) further illustrates the unquestioned finality of the judgment and the existence of the limitations and repose defenses.

Any significance, however tangential, of whether or not this judgment has a *res judicata* effect, was eliminated when the dismissal without prejudice of the 1990 suit was followed by the dismissal of the 1987 suit *with prejudice.* The latter did result in the Simmons' claims being forever barred. There is no justification, legal or equitable, for following the government's initial suggestion, which, if accepted, could have the anomalous result of reinstating this case under Section 27A(b), while the claims in its companion case, *First RepublicBank,* would be dismissed, upon a finding of unconstitutionality of the statute.

II. ONLY THIS CASE PRESENTS THE OPPORTUNITY TO REVIEW THE FIFTH CIRCUIT'S INTERPRETATION OF THE THREE-YEAR STATUTE OF REPOSE FOR SECTION 10(b) ACTIONS, WHICH IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *LAMPF* AND *DANZER*

Respondents concede that this Petition currently provides the only vehicle for this Court to consider the Fifth Circuit's view that Section 27A(b) requires reinstatement of cases in which the three-year period of repose expired before the filing of suit on a Section 10(b) claim. *Brief for the United States* at 9. The issue of whether Section 27A(b) can constitutionally be applied to reinstate claims eradicated by the statute of repose is of national importance and affects the rights of numerous litigants in pending cases. Failure to consider that issue may prevent the final disposition of this case and others even if this Court decides the issue which arises both here and in *First RepublicBank*. Accordingly, this Petition should be granted.

Contrary to Respondents' assertion, the Fifth Circuit's conclusion that the repose period affects only remedy and not liability is directly contradicted by this Court's determination in *Lampf*. In addition to the question of what time limits apply to rights and liabilities under Section 10(b), this Court in *Lampf* addressed the *nature* of the three-year period. The *Lampf* plaintiffs argued that if the one-and-three-year scheme were applied to Section 10(b) claims, their cause of action should nonetheless be saved by the equitable tolling doctrine. The Court squarely concluded that "[t]he 3-year limit is a period of repose inconsistent with tolling."

Lampf, 111 S. Ct. at 2782. " '[T]he three-year period can have no significance in this context other than to impose an outside limit.' . . . Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Id.* (quoting Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235, 288 (1989)).

The legislative histories demonstrate that when Congress adopted the Securities Act and Securities Exchange Act, it intended the three-year limit to be an absolute beyond which liability would not exist. As the Seventh Circuit has observed, "The legislative history makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute." *Norris v. Wirtz*, 818 F.2d 1329 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987) (citing 1 *Federal Securities Law – Legislative History 1933-1982*, p. 1010 (1983)).

Respondents suggest that *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), can be interpreted to permit a constitutional reading of Section 27A(b) as applicable to cases in which the three-year period of repose expired prior to suit. Respondents' argument ignores not only the plain language of Section 27A(b), but also this Court's holdings in *Lampf* and *William Danzer and Co. v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925).

In *Usery*, congressional creation of new liability was not preceded by an affirmative declaration as to the rights and remedies of potential litigants. This Court has

never sanctioned the taking of vested rights by reinstituting old liability which has been extinguished by virtue of a prior legislative pronouncement. As this Court held in *Danzer*, the creation of a right of repose, coupled with the running of the statutory period, vests a potential defendant with a substantive right to remain free from liability. That right is protected by the Due Process and Takings Clauses of the Fifth Amendment. Neither *Usery* nor any other case cited by Respondents has involved a legislative taking of vested property rights. Respondents err when they argue that this Court's holding in *Danzer* may be ignored.

Furthermore, nothing in Section 27A(b) purports to create any new liability. Members of Congress who supported Section 27A urged that the amendment would do nothing more than permit the prosecution of claims "commenced on or before June 19, 1991" based upon already existing liability. By its plain language, the statute purports to affect only claims based upon pre-existing liability.

CONCLUSION

The judgment entered in this case is final and gives rise to the constitutional rights guaranted to the Judiciary as well as Respondents. Section 27A(b)'s circumvention of these rights is the subject of the split between the Sixth and Fifth Circuits. Moreover, this Petition raises an additional constitutional question: that prior to the institution of this lawsuit, the expiration of the period of repose

vested Petitioners with the substantive property right to freedom from liability.

The Fifth Circuit's holdings conflict with the Sixth Circuit's analysis in *Plaut* and this Court's holdings in *Danzer* and *Lampf*. The writ of certiorari should issue.

Respectfully submitted,

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